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ABSTRACT

The booklet examines economic handicaps faced by homemakers and outlines a program for marital property reform. The document is presented in three chapters. Chapter I stresses the need for marital property reform by presenting case studies of situations in which a wife's contributions to a marriage were unrecompensed. Chapter II presents underlying assumptions of community property laws in various states. Topics discussed include problems in classifying property as community or separate; management and control of property; credits and debts; interpersonal contracts; dissolution of the community; problems encountered when couples move from state to state; and federal tax treatment of community property. Chapter III offers recommendations for classification of property in a model marital property system. Recommendations are that: (1) marital property should include all property, rents, and profits acquired by either or both spouses during marriage--except property designated as separate; (2) separate property must be formally declared; (3) all property is presumed to be marital property unless proven to be separate property; and (4) all expenditures from separate assets for family use are to be considered as gifts. (DB)

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TOWARD A TRUE MARRIAGE PARTNERSHIP

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Norma Briggs

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

> The assumption that women, however hard they work in the household and however much of actual money value that work has, do not support themselves but are supported by their husbands, that they earn nothing and own nothing -- that assumption, upon which all our property laws are based, is so abominable that I cannot find words to express my opinion of it.
>
> -- Theodora W. Youmans
> President, Wisconsin Women's Suffrage Association
> 1915

Wisconsin Governor's Commission on the Status of Women

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1976

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Kathryn F. Clarenbach
Chair, Wisconsin Governor's
Commission on the Status
of Women

November 1976

ABBREVIATION OF TERMS AND GLOSSARY

c/p: Community property.

s/p: Separate property.

APPORTIONMENT: Basic classification principles define what is owned by the marital partnership or separately by one spouse; apportionment is the process or formula for carrying out the classification principles regarding assets which are or can be classified as partly separate and partly marital property.

BEQUEST: A gift of personal property by will.

CLASSIFICATION: The basic definition of property as "marital property" or "separate property." It is a determination of ownership on the basis of principles.

COMMINGLING: Mixing up assets or funds from separate sources and marital sources. For example, the use of one bank account in which both separate and marital funds are deposited.

CONVEYANCE: The transfer of ownership of real property from one person to another. The document by which this is effected, a deed.

DESCENT: Acquisition of property by hereditary succession as defined by local succession statutes, rather than by a will.

DEVISE: A gift of real property by will.

FORCED SHARE: That portion of an estate which a decedent's surviving spouse can claim by law, even if it has been willed to another.

JOINDER: A requirement that two or more persons act together for a transaction to be valid; e.g., when both spouses must sign a deed for land.

JOINT TENANCY: Ownership with others of property with the right to survivorship, so that on the death of one the others own the whole property.

INCHOATE EXPECTANCY: An interest which is imperfect and incomplete at present, but which will become perfect and complete upon the occurrence of a future event. In the past, when the wife's interest in community property was merely an inchoate expectancy, she did not acquire full and perfect ownership rights and interest in her half until the community was dissolved.

MERETRICIOUS RELATIONSHIP: Couples who cohabit without a marriage ceremony or where both spouses knew the marriage to be invalid.

NATURAL INCREASE: A rise in the value of property which is purely the result of economic forces and not due to labor or investment of funds. For example, a rise in the value of a parcel of land because a shopping center is built and a residential section developed by other persons near the parcel is purely the result of economic forces.

PUTATIVE MARRIAGE: A marriage where the couple has participated in a marriage ceremony, but the marriage is void because legal qualifications have not been met. For example, a previous divorce has been declared invalid.

REAL PROPERTY: Real estate.

SURETY: One person's promise of payment or performance if another person fails to pay or perform.

TENANCY IN COMMON: Ownership of an undivided fractional interest in property, with no right of survivorship on other interests in the same property.

TORT: A private or civil wrong or injury, which is not based on a contract. A common tort is the causing of injury or damage in an automobile accident.

TORTFEASOR: One who commits a tort; a wrongdoer.

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INTRODUCTION

In recent years, Wisconsin women have grown increasingly aware of and concerned about the severe economic handicap faced by women who choose to be homemakers. These women, who have accepted the role our society has designated as the most noble and fulfilling work of women, are often relegated to degrading poverty when a family crisis arises. Our society encourages young women to forsake career plans and personal ambition in order to devote themselves to their husbands and families, and then ignores those who, because of disability, death or divorce, don't simply "live happily ever after." To date, social reform legislation has not dealt adequately with the problems of women like the middle-aged housewife with no job skills whose husband has left her for a younger woman, or the young widow with children to raise alone and an inheritance tax burden which depletes the family assets. Women in such crisis situations quickly realize that the "noble homemaker" platitudes are empty rhetoric, that under present laws a homemaker's contributions to her family and her community are systematically undervalued.

Led by the Wisconsin Commission on the Status of Women, a group of concerned legislators, attorneys, and lay people began an attempt to improve the economic status of the homemaker. Our early efforts were oriented toward providing economic protection for homemakers in family crisis situations. We succeeded in reforming the state inheritance tax system, so that much of the property owned by a couple in joint tenancy is taxed on half its

full value, when the breadwinner dies. We formulated divorce reform legislation which requires an equitable property division, taking into account non-economic contributions to the marriage, and which provides for strict enforcement of financial support orders. We were successful in our efforts to pass legislation outlawing discrimination in the granting of credit on the basis of sex and marital status.

Yet, many urgent problems remained unaffected: restrictions on a wife's right to will marital assets, the homemaker's lack of control of the family finances and her nonexistent role in family economic decisions, the fact that even with our credit reforms a homemaker needs her husband's cooperation to establish her own line of credit, and more. Slowly we began to realize that all these problems were interrelated. Rather than treating each one separately, as an independent issue, we began to look at all these problem areas as symptoms of a fundamental inequity embedded in our social structure: a marital property system which ignores non-monetary contributions to the marriage relationship. A change in the way husbands and wives own property accumulated during their marriage would ease the economic burdens faced by homemakers at all crisis points in their family lives, and would give legal recognition to the social reality that marriage is a joint enterprise.

Wisconsin, we learned, is -- like most states -- a "separate property" jurisdiction. This means in essence that each spouse alone owns and controls whatever s/he earns or is given. The marriage contract -- which the couple cannot modify -- requires the husband to support the family financially and permits him alone to determine the standard of living. In return for the promise of support, the wife must provide homemaking, child care, and sexual services.

In contrast, eight southern and western states have adopted a system of "community property." In these states, earnings of either spouse during the marriage belong equally to both. The spouses may still own property individually -- for example, gifts, and property acquired prior to the marriage, are separate

property -- but the mutuality of the marriage relationship is reflected in the presumption that assets earned during the marriage belong to the husband and wife equally. This basically attractive model had long been flawed by a rule which gave the husband sole responsibility for managing and controlling the marital assets. Under that rule, a wife's economic status during the marriage was one of dependence; her economic advantage came only when the marriage ended in death or divorce. However, we found that in response to the mandate of the equal rights amendment most c/p states have moved to a system providing husband and wife with equal management rights. After a thorough study of c/p systems -- summarized in Section II of this paper -- we were convinced that the c/p concept was essential to assigning fair value to the contributions of a non-wage earning spouse. Yet, we found flaws in the c/p systems which discriminated (though less severely than s/p laws) against an economically dependent spouse. For example, where a poor woman marries a wealthy man and they support themselves on money he earns as interest -- with no wages earned during the marriage -- there are no community assets and the wife thus receives nothing to compensate her for the performance of her wifely duties. And we saw other problems as well. For instance, where one spouse manages to accumulate assets through hard work and diligent saving, despite the lack of cooperation on the part of the other spouse (who may be a spendthrift, or an alcoholic, contributing nothing of value to the family enterprise), that irresponsible spouse still owns half the assets so carefully set aside by the other. We found that modifications of the c/p system could solve some of these problems. But we came to realize that no single standard system -- regardless of how fair it is to the majority of couples -- can meet the individual needs of people in special circumstances.

Thus, we concluded that the opportunity for a couple to alter the basic property system to conform to individual needs was a central aspect of reform. In s/p states today, such marriage contracts are severely discouraged and often are not enforced. We explored the business partnership as a possible model for

regulating the marriage relationship, and determined that the flexibility allowed business partners could responsibly be extended to marriage partners. However, the business partnership model could not be adopted completely for use in the marital relationship. The business model presumed that the partners are equally sophisticated and experienced, and that they deal with each other unemotionally -- "at arm's length." It would be absurd to expect marriage partners to develop toward each other a "strictly business" attitude on economic matters. And, given the sex stereotypes about "appropriate" roles for women still prevalent in our society, and the discrimination women still face in the job market, a conclusion that husbands and wives have potentially equal economic bargaining power cannot yet be justified. Consequently, we determined that certain safeguards should be required; most contracts should be in writing, and should specifically enumerate all rights waived or additional obligations incurred.

We then had outlined the basic feature of this reform: a marital partnership property system which presumed joint and equal ownership and control of all marital assets unless the couple had specifically agreed otherwise. Two tremendous tasks remained: one, to formulate and decide upon the hundreds of details that transform a general principle into an understandable and workable legal system; and two, to pinpoint the exact changes needed in our current law for the implementation of our new system. In organizing the huge volume of material we had to deal with, we were aided enormously by the proposal of the British Columbia Commission on Property Reform, a path-breaking attempt to formulate the changes needed when converting from a s/p system to a c/p system.

Our preliminary recommendations appear in Section III of this paper. Much work remains to be done before we will have a marital partnership property model which is clear and complete; we are still at the beginning. Yet, we wanted to share with you our vision of a society in which marriage is truly an equal partnership.

I

WHY WE NEED MARITAL PROPERTY REFORM

Most people, when they marry, believe that they are entering into a cooperative venture. Often, the husband and wife are both employed outside the home, and they share homemaking and breadwinning responsibilities. Sometimes they work side by side, operating a family farm or business. Or perhaps they divide responsibilities along traditional lines, with the wife performing homemaking services and the husband providing financially for the family. However they divide responsibilities, most couples feel that both husband and wife are active participants in and contributors to the family and its welfare. They feel mutually responsible for the burdens of family life, and share the joy of its benefits. Most people see their marriages as partnerships -- a mutuality of emotional and economic interests and concerns.

In most states, however, the law looks at the marriage relationship differently. In all separate property jurisdictions (42 of the 50 states), marriage is a contract according to which a husband and wife agree to do certain limited things for one another. Briefly stated, the husband is responsible for the family's financial support; the wife is expected to provide homemaking, child care and sexual services. Any money earned by or given to either spouse belongs to that spouse alone.

What this means for most families is that a wife earns her room and board by performing her "wifely duties." Her labor entitles her only to this day-to-day maintenance; she earns no share in any assets the couple may accumulate unless she makes a direct financial contribution.

A woman finds out how undervalued her contributions are when her marriage is in trouble, when her husband dies, or when she wants to make a will. Usually she learns that she is not an equal partner in the marriage only after years of effort expended on family concerns. The following true stories illustrate the extent of inequality between husband and wife in separate property jurisdictions.

Mrs. Rasmussen's Estate

Margaret and Harold Rasmussen, like most people married in the 'forties, chose a traditional relationship: Harold brought home the paycheck, while Margaret remained in the home to care for their sons, Eric and Ky. Each week, Harold turned his paycheck over to Margaret; she did the family's bookkeeping, paid the bills, and rationed out money for household and personal expenses.

The Rasmussens didn't have much money. For most of their married life, they lived with Mrs. Rasmussen's mother, not even able to afford a home of their own. But Margaret believed that her boys should go to college, and she managed to save a little here and there for their education. She economized in all the little ways in which a housewife can economize. Occasionally, her mother made a donation to the college funds. Slowly, but surely, two savings accounts grew.

Margaret Rasmussen died in 1963, when her sons were teenagers. She left a savings account of nearly $2,000, which she held in trust for Ky, and another of more than $3,000, which she held in trust for Eric.

Harold Rasmussen remarried and moved out of his mother-in-law's house. $5,000 seemed like a lot of money to him. He wanted it, and he went to court to get it. "I earned that money," he argued, "and I never gave it away. I merely entrusted it to Margaret to pay the bills. The surplus belongs to me." The court agreed -- despite the fact that there would have been no surplus without Margaret's careful economizing, despite the fact that Margaret's mother had contributed some of the funds. "The general rule in

separate property states," said the court, " . . . is that the excess left after paying the joint expenses of . . . the family remains the property of the husband . . ." The boys' college money went to Harold and his new wife. Margaret's long years of scrimping and saving were an exercise in futility. (Rasmussen v. Oshkosh Savings and Loan Association, 35 Wis.2d 605 (1966)).

A Skinflint Married

While Margaret Rasmussen was treated unfairly, at least she had the opportunity to make family financial decisions while she was alive. This opportunity was denied to Lydia McGuire, a farm wife.

In 1919, Lydia, a young widow with two daughters, married Charles McGuire, a middle-aged farmer. For more than 30 years she was, in her words, a "dutiful and obedient wife," working in the fields, keeping a garden, cooking and cleaning, raising up to 300 chickens at a time for her poultry and egg business, and doing other farm and household chores. She used her poultry and egg money to buy groceries and clothing. Charles was unwilling to give her money for any purpose.

In more than 33 years of married life, Charles bought Lydia only one piece of clothing: a coat purchased after 30 years of marriage. As Lydia grew older, she developed health problems and was no longer able to do the heavy farm work which had provided her with food and clothing. Charles bought the groceries and paid her medical bills, but refused to pay for clothing or other necessities. Lydia's wardrobe consisted of gifts from her daughters of a dress or two a year.

In the middle 1950's, the McGuires lived in a house which lacked an inside toilet, bathing facilities, and a kitchen sink. Lydia had to draw water from the well and heat it in order to bathe, wash dishes, and do laundry. The house was heated by an old coal furnace which did not work well and which required Lydia to scoop coal and ashes. They owned a car (with a malfunctioning heater) which was 24 years old, and a pickup truck that was even

older. They had a telephone, but Lydia was not permitted to make long distance calls to her daughters who lived in other states.

Charles owned approximately 400 acres of farm land (which rented for about $9,000 a year), more than $100,000 in government bonds, and several thousand dollars in other savings.

When Lydia was 66 years old, she went into court and asked that her husband be required to provide her with a home equipped with indoor plumbing and a modern furnace, a new automobile with an effective heater, and a reasonable sum for personal living expenses. The court denied her request, explaining its position as follows:

> The living standards of a family are a matter of concern for the household and not for the courts to determine, even though the husband's attitude . . . leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out. Public policy requires such a holding.

In other words, Mrs. McGuire would have to leave her husband before a court would enforce the right of support to which her marriage supposedly entitled her. (McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (1953)).

A Skinflint Divorced

If Lydia McGuire had decided to leave her husband, would the court have been more sympathetic to her plight? Of course, no one can really answer that question, but we can look to a more recent case to see how a wife's contributions to a marriage are valued at divorce.

Gene and Leann Rock were married in 1969. He was a medical student; she, a high school graduate, worked as a practical nurse and as a waitress to support the family while Gene completed his course work and residency. One child, a son, was born in 1970; Leann continued her employment until the family moved so that Gene could accept employment as a radiologist.

In 1972, Gene earned more than $44,000. In 1973, his income totalled more than $90,000. Yet, he contributed for family

expenses only $150 a month, plus toilet articles he brought home from the hospital where he was employed. He refused to allow Leann to use an automobile, regardless of the distance she had to travel or the weather conditions. He refused to furnish their apartment, except for body-building equipment which he bought for his own use. He insisted that the water heater be turned off, to conserve electricity, except when he wanted a hot bath.

When Leann brought suit for divorce, the court took note of Gene's unreliability as a provider and the likelihood that he would not comply with child support and alimony orders. Additionally, the court was aware of Leann's limited earning capacity, and saw the need for a "substantial" property award to support her and the child. Consequently, the court ordered that she receive a lump sum of $64,985 -- less than Gene could earn in a single year, and not quite half of their acquired assets -- and no alimony. Leann had made it possible for Gene to earn a substantial salary. She had supported him through much of the marriage, and had lived in poverty for the rest. She had helped him to receive his M.D. degree, while she had minimal training and job skills. She had a five-year old child to care for. And the court thought it was generous in granting her less than half the family's assets and no interest in Gene's future income, which he could earn only because of her contributions. (Rock v. Rock, 236 N.W.2d. 191 (S.D. Sup. Ct., 1975)).

Honor Thy Wife

For another example of the value placed on a wife's contributions at the time of divorce, take the case of Jim and Irene Murdoch. When they married, in 1943, she owned two horses; he owned 25 to 30 horses and eight head of cattle. They hired themselves out as a team of ranch hands for several years, saved their money, and invested in a dude ranch. Throughout the years, they worked side by side, saved their money, and accumulated more valuable property. Irene did the usual household chores, and also "haying, raking, swathing, mowing, driving trucks and tractors and

teams, quieting horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done." For five months out of every year, Jim was away from the ranch attending to his duties as an employe of the Forestry Service. During this time, Irene managed the property alone.

Additionally, Irene contributed financially to their joint ventures. She purchased household furnishings and appliances, and the Murdochs used money given to and earned by her for the down payments of various pieces on property.

In 1968, Jim asked Irene to release her dower rights to a piece of their property, so that he could sell it. When Irene refused the request, Jim beat her so badly that she was hospitalized. Subsequently, they separated, after 25 years of marriage, with Jim remaining in possession of the property.

Irene went to court, asking for a legal separation, ownership of their ranch home and the land surrounding it, and a one-half undivided interest in the land, cattle, cattle-brand, and other assets. The court granted her only maintenance of $200 a month. All the land, cattle, and other assets -- including the family home -- went to Jim. The court justified its order in this way:

> The land was held in the name of Mr. Murdoch at all times. The cattle and equipment were also held in his name; income tax returns were filed in his name; no declaration of partnership was ever filed . . .; and I, therefore, do not form the conclusion that the (Murdochs) were partners, or that a relationship existed that would give (Mrs. Murdoch) the right to claim as a joint owner in equity in any of the farm assets.

Irene Murdoch had devoted 25 years of her life to making her husband a wealthy man. Her reward was a severe beating and the promise of $200 a month. (Murdoch v. Murdoch, 1 W.W.R. 361 (Sup. Ct. Canada, 1974)).

A Widow's Rights

The court in the Murdoch case put great weight on the fact that their property was held in Jim Murdoch's name. One might conclude that a wife may protect herself by making sure that she is a joint tenant, or owner, of the property. While a wife who is

a joint tenant with her husband may pay less in inheritance tax than she would if her husband alone owned the property, the protection offered by joint tenancy is really very limited in other situations since ownership is generally determined not by the name on the deed but by contribution to the purchase price. Furthermore, insofar as joint ownership is determined by title, it is the name on the deed to the property that counts -- not contracts, loans or other official documents. Shirley Weger learned this fact the hard way.

Shirley married Herman Weger in 1948. He had been married previously and was the father of a son. A few years after the marriage, Shirley was injured in an automobile accident and received $11,000 in damages for the injury. The couple decided to go into the motel business, using Shirley's $11,000 to purchase land and borrowing $73,000 for construction costs. Both Shirley and Herman signed the loan, though only Herman's name appeared on the deed. Herman, who worked in construction, was general contractor during the construction of the motel. After it was completed, Shirley managed the motel for a year while Herman worked at an outside job. The motel venture was then successful enough that Herman was able to quit his job, and together they ran the motel for several years.

In 1960, the Wegers sold the motel on a land contract for $252,000. Shirley signed the document and was included as a party to the contract. However, payments on the contract were made to Herman alone. Since he had always done the family bookkeeping, Shirley never asked him what he did with the money. She did sign the tax returns Herman prepared each year, which reported the interest on the land contract as being equally divided between the two of them.

In 1973, Herman died. Only then did Shirley learn that Herman had deposited all the land contract payments in a savings account which he maintained jointly with his son from his previous marriage, and that, though she was a party to the land contract, she was not considered a joint tenant in its proceeds. Shirley went to court. "That money is half mine," she argued. "I bought the land the motel stands on. I signed the loans for the money to build it. I helped operate it, day in and day out. And I signed the land

contract, and my name is on the mortgage!"

The court disagreed, saying that it was presumed, since her husband held title in his name alone, that she was made a party to the contract only to waive her dower and homestead rights; she would not be considered a joint tenant unless she could conclusively prove that a joint ownership was intended. The loans, the mortgage, and the income tax returns weren't enough proof for the court.

"At least give me my $11,000 back," Shirley pleaded. But the court denied her even that: there was no evidence, other than her word, that the land had been purchased with her money.

Finally, Shirley said: "If this is really the way it is, my husband lied to me and defrauded me of my share of the proceeds. Let me prove this in a new trial." But the court denied this request as well: "There is no basis on which this court could find any miscarriage of justice . . ." (In re Weger, 71 Wis.2d 484 (1975)).

Unfair Trade

The preceding case histories have clearly indicated that women's contributions to their marriages have been systematically undervalued by our laws. You might hope, then, that individual couples will make personal agreements to be more fair with each other. But, as Greta Shetney discovered, these agreements may not be upheld by the courts.

Greta and Orville Shetney were married for sixteen years prior to their divorce in 1968. They had entered into an antenuptial agreement providing that Orville would assist Greta in obtaining her Ph.D. degree if she would first assist him in obtaining his Ph.D. degree. Greta had lived up to her part of the bargain, having supported the family through expenditure of her earnings and savings, and having assumed debts totalling $11,000 on real estate and an automobile. At the time of the divorce, she was 42 years old, earned $7,300 annually, and needed further education in order to advance in her field. Orville had completed his degree and earned substantially more.

The court refused to enforce Greta and Orville's agreement, because it was of the opinion that the terms of the contract were so vague that a jury could not determine its nature and extent. Additionally, the court held that Greta had not proved that there really was a contract. (The agreement had been made verbally and was never put in writing). Thus, Orville, educated and earning a substantial salary, was not required to live up to his end of the bargain; Greta, whose education and work experience by the court's own admission, "could not be expected to provide the foundation for stable earnings in the future," was left to fend for herself. (Shetney v. Shetney, 49 Wis.2d (1970)).

Legacy from the Past

Under old English common law, a woman lost virtually all control over her person and her property when she married. William Blackstone, writing his Commentaries on the laws of England in 1765, summarized the legal status of married women in the following words:

> By marriage, the husband and wife are one person in Law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing and protection she performs everything . . . Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage . . . The husband is bound to provide his wife with necessaries by law, as much as himself; and, if she contracts debts for them, he is obliged to pay them: but for anything besides necessaries he is not chargeable . . . If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own: Neither can she be sued without making the husband the defendant . . .
>
> The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement,

> in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction is confined within reasonable bounds . . .
>
> These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England. (I Blackstone, Commentaries 442-445 (1765)).

This legal fiction of "unity of spouses" meant that, upon marriage, the law saw the partners as only one person, and that person was the husband. As a result all property brought into the marriage by the wife became the property of the husband, as her trustee. Once wed, a woman had no right to deal with any property. She had no right to enter into any contract. Her husband had absolute right to deal with the property of the marriage in any way he chose, including disposing of it.

The inherent unfairness of this system was recognized late in the 19th century and, in an effort to rectify the situation, common law jurisdictions enacted the Married Women's Property Act. This Act is still the basic statutory protection of the right of a married woman to deal with the property she brings into the marriage. It gives a married woman the right to enter into contracts and to assume liability to the extent of her own separate property. Thus, what was created by the Married Women's Property Act was the system of "separate property": a system which acknowledges that both the husband and wife bring into the marriage their own property; a system which views the property and its products as the separate property of each spouse throughout the marriage.

The 42 separate property states consider all property or assets received by gift, grant or inheritance (and their profits) and all earnings before and during a marriage to be that person's separate property. During a marriage each spouse has complete control and management of his or her property, and the right of action concerning it. This means that the earning/owning spouse determines what happens to the property and can sell it, transfer

it, will it or give it away without the consent of the other spouse. The only limitations are the obligation of the husband to support his wife at whatever level he considers fit and the prohibition on transferral of property with the intent to defeat the survivor's legal claim to a portion of the estate left by his or her spouse.

This legal separation of a family's financial resources into distinct funds labelled "his" and "hers" assures the dominance of the wage earner and the economic dependence of the homemaker. It is antithetical to the framework of mutual cooperation, concern and effort on which a marriage partnership of equals must be built.

What We Need

We need to develop and adopt a legal structure in which marriage would be a relationship of equals, a partnership of shared responsibilities. We need to create a system of laws which would eliminate the stereotyped division of labor and ownership mandated by our current "separate property" laws and the traditional marriage contract and which would:

* operate simply and equitably
* recognize and encourage equality between spouses
* recognize that the contributions of the economic provider and the homemaker are of equal value to the relationship
* protect and support each spouse's right to make decisions and share equally in the family's fortunes
* allow couples to determine which roles they wish to perform during marriage and make individual arrangements for the ownership of property.

Such a model system should permit spouses to own some property separately -- for example, gifts, and property acquired prior to the marriage. However, assets accumulated by either spouse during the marriage -- wages, investment income, profits -- should belong jointly to both spouses. The law would view the husband and wife as partners who may make different kinds of contributions to the marital enterprise but who have equal financial interests in the marriage. The homemaker, or a spouse with limited earning power, would have an equal voice with the principal breadwinner

in managing family assets and in making family financial decisions. She or he could obtain credit independently, on the basis of the marital assets. Each spouse would have the same right as the other to spend or borrow money, to make gifts, and to will property at death. A married person could then fulfill family responsibilities such as childrearing or care of an aging parent without being viewed as a non-contributing partner, entirely dependent on the good will of the wage earning partner.

The terms of the marriage contract would change. Instead of the arbitrary, sex-stereotyped division of responsibilities we have now, requiring the husband to provide financial support and the wife to provide services, both spouses would pledge to support each other, choosing their own division of labor between the two components of support: economic contribution and personal services. The homemaker would have, instead of a hollow financial support right which courts will not enforce during marriage, a clear legal right to half the marital assets. She would be an equal partner, not an unpaid servant.

When a marriage terminates because of death or divorce, the homemaker's contributions would be recognized as having economic value. The tremendous tax burden borne today by widows, because they have not "contributed" to the accumulation of assets, would be eased; estate tax would be due on half, rather than on virtually all, of the couples' property. The homemaker who dies before the breadwinner would be able to dispose of her share of the marital property by will. If the marriage ends in divorce, it would be presumed that marital property would be divided equally between the parties; a presumption modified only by special considerations relating to their individual needs and circumstances.

Current law provides no flexibility in the marriage contract; couples whose needs are not well served by the traditional contract have no recourse except to trust each other as they work out their own arrangements. Courts generally will not enforce the private agreements these couples make. Under an equal marital partnership system, couples would be able to enter into legally enforceable individual agreements altering the terms of the standard contract to fit their own needs and desires.

What Could Have Happened

Let us return briefly to our case histories, to see what differences this new proposal would make in real-life situations. How would these women have fared under a marital partnership system?

Margaret Rasmussen, who saved futilely for her sons' education, would have been able to distribute half the marital assets as she chose at the time of her death. If the only assets owned by the Rasmussens were the two savings accounts, at least half of that money could have gone to the boys. If the Rasmussens had owned other assets, Margaret could have designated even more money for her sons' educational expenses. She, as an equal partner entitled to half the marital property, could have disposed of that property as she wished.

Lydia McGuire, the farm wife whose husband refused to provide adequate support, would have been able to go out herself and purchase clothing and other necessities for her daily living. If her husband refused to cooperate on major purchases, such as a new car or furnace, she would have been able to go to court for relief. The probable result from such a court action would be partition of the assets so that Lydia alone could make major purchases with her share of the marital property.

Leann Rock, who divorced her miserly husband, would have thousands of dollars more than the court actually awarded her. The starting point for the property division would have been a 50-50 split -- more than she actually received. This amount would have been increased after consideration of her limited earning capacity, Gene's substantial earning capacity, her child care responsibilities, and the expectation of Gene's unreliability in making support payments. The total amount she could have received would probably have been nearly double what she actually was awarded. This extra money would have yielded enough investment income for her to live comfortably while she developed job skills so that that she could support herself and her son. It also would have provided her with a financial cushion for emergencies or for her son's future expenses.

Irene Murdoch, who worked for 25 years to make her husband a wealthy man, would have received her half of the couple's marital assets. Her long years of ranch work would have been recognized as having economic value to herself as a member of the partnership. Instead of being pensioned off at $200 a month (which she may have difficulty collecting), she would have been able to benefit from the actual fruits of her labor. For a woman in Irene's position, this may mean the difference between remaining self-supporting and needing public assistance.

Shirley Weger, whose husband profited from her work and motel investment, would have received her $11,000 plus a one-half interest in the remaining profits from the motel sale. Instead of nothing, she would have received nearly $100,000, which would have enabled her to retire in comfort and dignity. For her, too, the difference may well be between financial independence and welfare.

Greta Shetney, whose husband backed out of their marriage contract, would have been able to collect money damages for non-performance of the contract if it met legal contract requirements. The contract damages would have been in addition to financial arrangements arising from the Shetneys' divorce. Greta then could have afforded to complete her education. She would have been able to fulfill her career ambitions and to support herself at a more comfortable income level.

All the women in these case histories would have been treated more equitably under a marital partnership system. For these women and thousands like them, recognition of a wife's contributions to a marriage means the difference between comfort and poverty, perhaps between self-sufficiency and public assistance.

II

AN ANALYSIS OF COMMUNITY PROPERTY LAW

Community property can be viewed as a first step toward complete contractual or partnership marriage. Many of the decisions which must be made in planning an equal marital partnership system have already been made in c/p jurisdictions. This section is intended to present the basic principles and policies of the c/p system briefly, to examine a few of the variations between the states and to present some of the necessary policy decisions which must be made before marital partnership legislation can be drafted. Although the eight c/p states begin with a shared premise, there are enormous variations in the way each state's problems are solved. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington each use a combination of statutes, case law and, on occasion, the original Spanish code. Each state's system is complex and has problems, including cases of unfairness to wives. Since no one state appears to have an ideal family code which should be adopted in toto, this analysis should provide the opportunity to select the best and most equitable features of each to fashion a model marriage partnership property system.

UNDERLYING ASSUMPTIONS OF COMMUNITY PROPERTY

1. A family is an economic unit, a small "partnership of gains," which is headed by two legally separate individuals who have a mutuality of interest and a present vested right in all marital property acquired during the marriage.

2. All labor is equally valued and equally necessary to the maintenance of a family; in the traditional family, one spouse is freed to become the wage earner because the other spouse maintains the home and family.

3. Husband and wife have equal status because of equal contributions to the welfare of the family. The contributions of the spouse who maintains the home are as necessary and as important as the wage earner's.

The consequence of these assumptions is the c/p central principle: husband and wife have equal rights in all property acquired or earned during marriage.[1] Proponents of c/p claim that it is a force to preserve the family as a social entity, mainly because of its basic equities. Also, it is claimed that c/p is more closely in harmony with the way most families now operate -- as a partnership to which both contribute.

C/p was defined in the original Spanish code as the "conjugal partnership"; courts today define it as a restricted

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1 DeFuniak and Vaughn, Principles of Community Property, 2d. ed. (1971), p. 115.

partnership and refer to it as the marital partnership. "The community is similar to a general partnership with coequal rights, regardless of the amount of capital or labor contributed," in cases where there is joint management and control.[2] Like a partnership, the community is not a separate legal entity apart from the persons in it. A service apparently rendered by one of the partners is in fact a service rendered by both partners of the community: when the wage earner works as an agent of the partnership, the non-wage earning spouse renders a personal service for the outside employer even though not personally performing the job by freeing the first spouse from certain necessary partnership business (housework, child care) so that s/he can perform the wage earning function.[3] The non-earning spouse's half of the wages paid to the other are not earnings for housework, but belong to him/her by virtue of the community partnership.[4] New Mexico statutes affirm the equal partnership of spouses:[5] "Husband and wife contract toward each other obligations of mutual respect, fidelity and support."

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2 Household Finance Corp. v. Smith, 70 Wash.2d 401, 423 P.2d 621 (1967).

3 In a partnership, who performs what service is irrelevant; when one partner performs chore/service x, it is a service by the partnership itself, even though the second partner was performing chore y at the same time.

4 Fink v. U.S., U.S. Ct. of Claims, 454 F.2d 1387 (Ct. Cl. 1972).

5 New Mex. Stat. 57-2-1.

CLASSIFICATION

Classification of property as separate or community is probably the most important aspect of the system, because all rights and obligations are determined by whether the property belongs to the community or to one spouse separately. Classifying, or characterizing, is the process by which the court labels each asset "separate" or "community." The classification of property as "community" or "separate" affects many matters, including: the right to will the property, to manage and control it, to give it as a gift, the application of inheritance laws, credit rights and debt obligations, the right to contract or sue concerning the property, the ownership of the profits from it. Litigation concerning marital property almost inevitably involves some aspect of classification.

A. WHAT PROPERTY IS COMMUNITY?

Basic Principles

1. All property acquired or earned during marriage is c/p, except that owned separately before marriage or that acquired by gift or inheritance. Community and separate property are differentiated, basically, by the means of acquisition:

   a. "onerously acquired property" -- a valuable consideration is given for the property, e.g., money exchange, labor, industry, talent, winnings: always belongs to the community.

   b. "lucratively acquired property" -- a gift to one spouse alone, inheritance: is considered s/p with a few exceptions.

2. All property acquired by exchange or purchase retains the characteristic of the original property. For example, if stocks are purchased with proceeds from the sale of a house owned separately by the wife, these stocks are also owned separately by her.

3. The mere fact that title is in the name of one spouse alone does not necessarily determine ownership; rather, ownership is determined by c/p law.[6] Without this principle the fundamental divisions of property under the classification rules could easily be avoided. All 8 states agree to this rule.

4. All property owned at dissolution is presumed to be c/p. The strength of this presumption varies from state to state and sometimes varies within a single state: it is set either by statutory formulation, case law, or by both. The burden of proof required to show that a particular piece of property is separately owned is often determinative of the outcome.

* POLICY DECISION -- What should be the strength of the presumption favoring the community?

These variations exist (listed from least favorable to the community to most favorable):[7]

1. New Mexico Statute: "acquisition" formula -- "Property which is acquired during marriage by either husband or wife, or both, is presumed to be c/p." This presumption need operate, however, only if there is evidence to show that the property in question was actually acquired during the marriage.

2. California case law: "long marriage" formula -- the longer the marriage, the heavier the burden of proving s/p.

3. Washington case law: "possession" formula -- property possessed at dissolution is presumed to be c/p.

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6 Reppy and DeFuniak, Community Property in the United States, (1975), p. 109.

7 Reppy, p. 103.

4. New Mexico case law: "unlimited" presumption -- the burden of proving that any property is separate is on the party so asserting.
(New Mexico case law imposes a heavier burden than its statute).

Considerations

The presumption that property is community arises when it is impossible to determine whether property is separate or community. The absence of identification and not the fact that assets are commingled raises the presumption. Clear, accurate records overcome this presumption. Inevitably, when commingling occurs tracing problems arise (tracing problems account for an important part of c/p litigation). Both New Mexico and the British Columbia proposal state: "the only separate property will be property that is kept clearly separate." [8]

Recommendation: That the presumption of community ownership place a heavy burden on the person asserting separate ownership, with clear identification through accurate records being necessary to rebut the presumption. Commingled funds should be irrebuttably presumed to be c/p. This appears to be the most fair solution both to the parties and to the courts since the burden of clear identification appears lighter than the burden of tracing and untangling years of commingled funds.

B. WHAT PROPERTY IS SEPARATE?

Basic Principles

1. All property acquired before marriage, or after marriage, by gift or inheritance is s/p.

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8 Commission on Property Reform, "Proposal for Law Reform, British Columbia (1975).

2. All increase in value of s/p from "natural causes" is s/p, and belongs to the owning spouse.

3. All increase in value of s/p due to community industry (labor) is c/p and belongs to the community.

The most fundamental and important difference among the states is whether the rents, profits and income (fruits) of s/p belong to the community or to the owning spouse alone. Other variations exist as to: (1) how the property and/or fruits should be valued at dissolution; (2) how to decide whether property was "acquired" before or after marriage.

* POLICY DECISION -- Should rents, profits, and income (fruits) of s/p be classified as s/p or c/p?

Two Basic Systems Exist:

Civil Law System -- Fruits of Separate Property Belong to the Community

Following the original Spanish system, Texas, Louisiana and Idaho declare that rents, fruits, and profits from s/p are shared, or c/p, although the owning spouse does not give up ownership of the property itself and retains it at dissolution. Louisiana allows a wife to opt out of this by filing a declaration that she claims the rents and profits of her s/p as her own. Idaho allows a wife to declare that such profits are for her separate use (no cases to show whether this means ownership or control). Texas does not allow alteration of the rule. The British Columbia proposal recommends that income from s/p be community, but that capital gains on s/p be considered s/p.

Under this system the major task at dissolution is to separate out how much "natural increase" has occurred and to award this to the owning spouse; the remaining profits or fruits are declared c/p. Courts have computed natural increase in different ways: by allocating a fair salary for labor (clearly community), then either: (a) allocating a sum to rents and profits (leaving the balance natural increase and separate); or (b) allocating a sum to natural inflationary increase (leaving the balance community rents and profit).[9] The particular methods and allocation problems are similar to those described below in the American Rule System.

The American Rule System -- Fruits of Separate Property Belong to the Separate Owner

Arizona, California, New Mexico, Nevada, and Washington declare that all rents, fruits and profits from s/p are s/p and that only the increase in value attributable to labor should be considered to be c/p. There are different methods for segregation to determine exactly how much of the increase in value is from labor when one spouse has separately owned assets and also contributes labor to the management of it:

1. Compute a fair return on s/p capital (e.g., 7% - 10%) and the rest of the gain is considered to be from labor and is therefore c/p. Problems -- if the fair return is calculated over a period of years: (1) the community may bear the loss for years of idleness and/or loss; or (2) the s/p may bear a loss for periods of inflation. This is one California approach.

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9 Reppy, p. 276.

2. Compute a fair salary for community labor over the years and the rest of the gain is s/p. This is an alternative California approach.

3. All-or-nothing approach -- if profit is mainly from labor, all gains are c/p; if profit is mainly from natural increase, it is all s/p. Past Arizona approach. This test is no longer used since it proved extremely vague and easily led to unfairness to either or both spouses.

4. Segregation test -- whatever owner/worker withdraws as salary or undesignated profit is c/p; the rest is s/p. This allows the owner/worker to determine the character of the profits. If there is no designation as to salary, all gains are c/p. This approach allows the owner to designate a very small sum for labor in proportion to net gains and the community gains may not reflect the true value of the services, hence the other spouse can lose. This is the Washington approach.

5. Suggested compromises -- calculate a and b and use figure most favorable to the community. Or, use the Internal Revenue Service (IRS) formula which includes all circumstances pertaining to the increase.[10]

Considerations

One of the major criticisms of c/p arises from the rule that the fruits of s/p are the s/p of the owning spouse. At dissolution it is possible for one spouse to end up with little or nothing. It arises in situations like these:

1. One spouse owns a business or farm before marriage, one or both spouses work for it and income from labor is valued low in comparison with overall profits.

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10 Reppy, pp. 261-264. The IRS formula has been used in only two tax cases, and requires extensive knowledge (or perhaps guesses) of all business circumstances during the period of profit. This should be considered later with more research.

2. One spouse is separately rich and little or no income is from labor.

3. Funds withdrawn from a separately owned business are not earmarked "salary" or "profits."

4. Earnings from s/p are used for family maintenance either entirely or in part.

In fact, it is possible that if one spouse has much s/p and the other spouse earns wages, not only does the wage earner not share in the profits of the s/p, but must share the wages earned. The situation is exacerbated by two other rules:

1. All expenditures for family maintenance are presumed to have come from community funds. (family expense doctrine).

2. At dissolution, s/p funds used for family maintenance may have to be reimbursed by the community to the spouse who contributed separate funds.

An infamous case in California points up the unfairness of this combination of rules:

Beam v. Bank of America,[11] 6 Cal.3d 12, 98 Cal. Rptr. 137, 490 P.2d 257 (1971). Mr. Beam inherited $1,629,129 and spent his time managing it. He wasn't too successful, for when the Beams were divorced after 29 years of marriage, his assets were only worth $1,850,507.33. Mrs. Beam raised four children and cared for the home. By using the "fair return"[12] test, he should be worth $4.2 million, so the court couldn't use that. By using the "fair salary"[13] test ($17,000 annually for a broker), their community income was computed to have been worth $357,000. Family expenses are presumed to come from community funds, and they had spent $24,000

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11 See section on Dissolution by Divorce, pp. 60-64.
12 Described on p. 26(1).
13 Described on p. 27(2).

to live each year ($696,000 total). Since the community is required to pay back the husband for his separate funds used for living expenses, the community owed him $339,000 ($696,000 less $357,000). After the husband's separate contribution is deducted from the total community income, the community has, theoretically, $18,000 remaining. However, "living expenses" means income consumed in daily living so all that can be in existence at dissolution are family assets such as home, furniture, car, etc. Evidently these assets were used to reimburse Mr. Beam for his $339,000 contribution because the court found no community property in existence at dissolution -- Mrs. Beam received nothing.

This problem can arise any time income from s/p is used to raise the level of living beyond total community income, and can result in the accumulation of such a small amount of c/p that the wife can be left without property at divorce or death of the husband.

Several suggestions have been made to get around this:

1. Replace the presumption that all family expenses are made from c/p with the presumption that only expenditures for basic family maintenance are made from c/p funds.
2. Prorate living expenses proportionately to s/p and c/p, and apply this proportion to savings at dissolution. (e.g., if community income is 60% of total income, then 60% of the savings is c/p.)
3. Estimate on the basis of tables what the average family with this income would save.
4. Abolish the family expense doctrine.
5. Require high proof of family finances to permit uncommingling, and if commingled, presume c/p.
6. All fruits and profits of s/p should be c/p.

7. All s/p used for living expenses can be presumed a gift, hence all family property accumulations are c/p.

8. Allow sharing of s/p upon dissolution.

Recommendation: The problem of the marriage which has acquired no c/p is one which should be carefully considered. It appears that the best solution is to consider fruits from s/p as c/p. British Columbia has recommended that net income from s/p be considered c/p. This protects the original investment by providing that net income is gross income minus essential expenditures ("only those expenditures necessary for the upkeep of the property, including property taxes, management fees, repairs and maintenance.")[14] This solution should diminish many of the problems of the rich/poor marriages.

If, however, it is not felt that income from s/p should belong to the community, then some other solution must be devised to protect the non-earning spouse whose spouse has had a large separate income, and little or no c/p has been accumulated at the time of dissolution.

* POLICY DECISION -- How should ownership (as s/p or c/p) be determined on the basis of "acquisition" before marriage and/or when both community and separate funds have been used for the purchase of the property?

The General Principle is that Property Acquired Before Marriage is Separate

But, naturally people don't get married with all their "deals" closed, contracts to purchase something completed, or purchase price completely paid, so it is not always simple to determine when property is "acquired." Also, even if the property is clearly

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14 British Columbia Proposal, pp. 10-11.

acquired before marriage, but then after marriage the purchase price is paid from wages (community funds), who "owns" it? Who "owns" it, of course, determines who controls it, and whether the income from it is separate or common property.

Various rules concerning "time" of acquisition:

1. The nature of the property, once fixed, remains. The time of title transfer is irrelevant; the time when the right was acquired controls the status of the property. (New Mexico and Texas). If I sign an agreement to buy a house, get married, then get the house and deed and pay for it with my salary (community funds), the house remains my s/p.

2. The time of title transfer controls. (Louisiana). In the above situation, the house would belong to the community.

3. When the right arose or title is transferred is irrelevant -- the property is both separate and community in proportion to the amount of separate and community funds used to purchase it. (California, Idaho, Nevada, and Washington).

4. Intent. Even if the right arose and title passed before marriage, the property is c/p if the parties intended it for community use. This will control, regardless of other rules. In the example above, if the house is to be our residence, it is highly likely that it was intended to be c/p. If, however, it was purchased to be used for rental income, the other considerations control.

Recommendation: That the rules concerning intent of the parties and proportionate ownership based on funds used for purchase be accepted. This seems to be the most flexible and fair solution.

Right to Reimbursement or Compensation

In all cases where community funds are used to complete the purchase of s/p (for example, the rental house above), or community funds are used for the improvement or maintenance of that s/p and

vice versa, a right to reimbursement or compensation arises.

The first consideration is whether the funds expended were intended to be a gift. If not, then some formula for reimbursement is applied:

1. Dollar-for-dollar compensation, and the property remains s/p. States differ in whether or not inflation or enhanced value is taken into account. Some states give the community a lien against the property, with a priority position among creditors at dissolution of the marriage.

2. Dollar-for-dollar compensation, but if the community contributes more than the separate owner, the property changes status and is owned by the community.

3. California apportionment, the community "owns" the property or the improvement in proportion to the amount of community funds spent on the s/p.

4. Where profits from the s/p belong to the community, community funds spent on the s/p are considered an investment and the measure of reimbursement to the community at dissolution is the lesser amount of (1) the amount spent, or (2) the added value to the property (at the time of dissolution) caused by the improvement.

5. Improvements to s/p caused by labor of the community, see section on the American Rule valuation for s/p income (pp.26-27).

Recommendation: That the California apportionment approach be used, but that a more detailed consideration of this be based on whether fruits from s/p are community or separate.

C. SPECIAL PROBLEMS IN CLASSIFICATION

1. Capital Gains on Separate Property:

Where the fruits of s/p are to belong to the community, the general principle is that "natural increases" remain s/p.

Determining what is a "natural increase" or determining the difference between capital gains and ordinary income is a complex problem, but if s/p income is to be deemed c/p, some basic rules will have to be worked out.

2. Insurance Policies:

   a. Property Insurance: The proceeds are of the same character as the property insured. However, if common funds are used to pay the premiums for insurance on s/p, then the community is reimbursed for the amount used.

   b. Life Insurance: (see section on Dissolution by Death, pp.67-68)

3. Earnings of Minor Children:

   Community property states generally deem the earnings of minor children to be the property of the community, or if the spouses are separated or divorced, it is the property of the custodian. Commentators generally view this as contrary to the principle requiring that the community owns only profits which are "onerously" acquired, and unfair to minors. At the present time, the earnings of minors in s/p states belong to their parents or custodian. Should this be considered?

MANAGEMENT AND CONTROL

In the past, one of the strongest criticisms of c/p has been the fact that powers of management and control over all the community assets have been enjoyed exclusively by husbands. The passage of equal rights amendments in several states has precipitated new legislation in most of the c/p states extending management and control powers to both husband and wife. Today, only Louisiana has not changed. In New Mexico, California, and Washington there have not yet been any reported problems arising from equal management statutes.

General Principles

A. SEPARATE PROPERTY

Husband has exclusive management and control over his property, and wife over hers. The only exception to this is the requirement of joinder of both spouses where the property is the family residence. If they hold s/p as tenants in common or joint tenants, the fact that they are married does not affect their powers to deal with their undivided interest. (Except in New Mexico which requires consent of both spouses to convey this interest to a third party). The spouses may enter into an agreement (either on agency principles or formally giving power of attorney) that the non-owner spouse is sole manager or co-manager of s/p owned by the other spouse. Generally, written proof of the agreement is required, especially if real property is involved.

B. EQUAL MANAGEMENT OF COMMUNITY PROPERTY

The states with equal management powers[15] divide the management three ways:

1. Equal and concurrent management where either spouse can acquire, dispose of or encumber the property: usually extends to personal property.

2. Joint management where both spouses must join to acquire, dispose of or encumber the property: usually extends to real property and gifts. California and Washington also require joint management of community household furnishings.

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15 See, for example: New Mex. Stat. 57-4A-7, 57-4A-9; Calif. Civil Code sec. 5125, sec. 5127; Wash. Rev. Code 26.16.030.

3. Sole management where only one particular spouse may manage the property: usually only separately owned property. New Mexico, however, has added an "exception" to equal management of c/p: the power of sole management over assets which have a document of title naming only one spouse, or where only one spouse is named in a written agreement concerning ownership with a third party.[16] Elaborating on the importance of title, New Mexico also requires that both spouses must join in transactions if the document, contract or title contains both names joined by "and." If their names are joined by "and/or" or "or," either spouse can manage it.

* POLICY DECISIONS -- 1. What property is to be managed and controlled by either spouse? Is there to be a limit in dollar amounts?

2. What transactions should require the consent of both spouses? Or a specific spouse?

3. To what extent are creditors to be protected?

4. Is there to be a right of action for a spouse who is prevented from exercising his or her right to management or control by the other spouse?

Considerations

Equal and Concurrent Management

The management questions involve not only equality between spouses, but protection of spouses from each other's "improvidence" balanced against protection of creditors. Washington has chosen as a priority value equality between spouses, but New Mexico has chosen to protect creditors at a slight expense to equality.

To maintain freedom and independence in daily life, ordinary transactions should be managed and controlled by either spouse. There has been much discussion about the possibility that with equal

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16 California and Washington have no statutes covering this situation and no cases concerning it have arisen yet.

management and control, one spouse will overextend the community assets and suggestions were made to limit the amount which one spouse could encumber or dispose of alone. No American state has done so, recognizing that a dollar limit would not really protect the family and would place unnecessary burdens on day to day transactions if both spouses were required to join in any transaction involving more than $x. British Columbia has suggested joinder for any transaction over $2000, in an effort to protect the major community assets. (There were no limits on transactions when the husband was sole manager, except the limit of fiduciary duty.) A second concern was that both spouses might independently and at the same time pledge community assets for a total beyond community means. No state has a statutory solution to this.

Another concern is what happens to bank accounts which are in the name of only one spouse but hold community funds, or an automobile purchased with community funds but the title names only one spouse, or stocks owned by the community and in the name of one spouse. Can the non-named spouse demand withdrawal? Sell the car? Sell the stocks?

What sort of risks do institutions take by either refusing or allowing the non-named spouse to make the transactions? What sort of procedures could protect them in any event? New Mexico attempts to protect the creditors by limiting the right to manage and control these assets to the named spouse. In so doing, an earning spouse can deposit the paycheck into a bank account in his or her own name and effectively prevent the other spouse from exercising the right to manage and control it. This risk, however, was seen

as less important than the burden and risk to institutions -- e.g., the burden of ascertaining whether or not the person is the spouse of the one named and whether the asset is separately owned or community -- thus the couple is left to settle this between themselves in most cases.

Joint Management

In order to protect the family home and to ensure both spouses' participation in major transactions, all states with equal management require both spouses to join in certain transactions -- for example, real estate, gifts, or household furnishings.

1. Community real estate: Joinder of both spouses is required for the sale, conveyance, or encumbrance of community real estate. California also requires both spouses to join in executing a lease for more than one year. New Mexico exempts purchase-money mortgages because the community is protected by the immediate exchange of value for value; and includes property which spouses hold as cotenants in joint tenancy or tenants in common as their individual s/p.

   Contracts to purchase real property were added in the required joint transactions to prevent attempts to circumvent the requirement of joinder of spouses; otherwise a contract to transfer could be made by one spouse alone, then be enforced to protect the third party.

2. Household furnishings: California and Washington require joinder of both spouses to encumber household furnishings. California also does not allow spouses to sell, convey or encumber the "furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property without the written consent of the other spouse." This provision is an attempt to preserve the family home. Others

feel that this requirement is unworkable, it would require any purchaser of household furnishings to inquire into the source and introduce needless uncertainty into transactions of household goods. The statutes of California and Washington do not define the extent of the term "household furnishings," which may also add to the ambiguity.

3. Effect of non- joinder: If one spouse attempts to complete a transaction which, by law, requires joinder of both spouses, both the non-consenting spouse and the third party need protection. In Washington, a purchaser of real property takes the title free of the other spouse's claim if it is sold by the spouse who has record title. Case law, however, places the requirement of investigating the marital status of the seller on the purchaser. In Idaho, Arizona and New Mexico the effect of nonjoinder is that the transaction is wholly void. In Washington and California the transaction is merely voidable and can be voided only by the non-joining spouse. The British Columbia proposal recommends that if a married person attempts to buy property which requires joinder, the seller must obtain a declaration from the purchaser that he or she has the capacity to act alone. If the seller does not obtain the declaration or knows it is false, the transfer is void. If, however, the seller is unaware that the declaration is false, the transfer is valid and the non-joining spouse must recover from the purchasing spouse's s/p or half of the c/p. Where a married person attempts to sell property without a required joinder, the B.C. proposal requires the purchaser to contact a Land Registry office (which records the marital status of land owners and the status of all real property as separate or community) and allows purchasers to rely on that. If the records show joinder is necessary, the contract is void. If the property to be sold is not real property and is not recorded, the third party must obtain a Statutory Declaration from the spouse attempting to deal with the property that he or she can do so alone.

Recommendation: There should be no question whether equal management and control be accepted, since this is the very heart of extending tangible equality to the non-earning spouse. We should, however, carefully examine the British Columbia proposal ($2000 limit for "either spouse" transactions; exceptions for bank accounts in one spouse's name) and the New Mexico single-title/ sole management exception, in the light of the possible problems and concerns listed above.

C. SPECIAL SITUATIONS

1. Emergency situations. All eight states provide for situations where both spouses are required for a transaction but one spouse is unavailable for some reason: incapacity, insanity, habitual drunkenness, disappearance, being held prisoner of war, or an open ended "unable-to-manage-his affairs" ground.[17] Resolutions range from allowing the available spouse to manage alone without consent of the other, to requiring court permission to do so, or to requiring the appointment of a guardian (other than the spouse) to join in transactions for the incapacitated or missing spouse.

* POLICY DECISION -- What sort of emergency powers should be granted and should a court order be required?

Considerations

a. Situation where both spouses are available, but consent is withheld: when the husband was sole manager, most states did not offer an action to dispense with the wife's consent in transactions needing the consent of both.

With equal management, the states have not added any new cause of action for this situation. The rationale is that this is a matter between the spouses -- if disagreement

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17 Reppy, p. 329.

has progressed so far that they cannot compromise, an action at this point will probably be only a prelude to a divorce action; hence, a waste of time and money.[18]

When this situation occurs in a business partnership, there is no remedy in court. In a marriage, too, it may be a problem to be resolved in an arena other than a court of general jurisdiction.

b. Where one spouse is unavailable or incapacitated may be a different situation and some procedure to allow one spouse alone to operate may be desirable. Since both spouses are likely to be required only for major transactions and real estate transactions, a court order should sufficiently protect the incapacitated spouse and third parties. To require the appointment of a guardian would not necessarily give a higher level of protection to either spouse.

2. Gifts

Consent of both spouses is required before gifts of c/p to third parties are made because the property is lost to the community. Generally, "trivial" gifts do not require consent of the other spouse; the court decides what is "trivial."

* POLICY DECISIONS -- 1. Should written consent or implied consent be required for gifts of c/p? Should a dollar limit be placed on gifts requiring no consent, implied consent, or written consent?

2. If consent has been withheld, is the gift void or voidable?

3. What sort of right of action should be given the non-consenting spouse?

Considerations

a. Some states allow "reasonable" gifts without the consent of the other spouse; reasonableness is measured both by the size of

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18 Bingaman, "Community Property Act of 1973: A Commentary and Quasi-Legislative History," 5 N. Mex. L.R. 1 (1974), p. 45.

The community assets and the person to whom the gift is given, e.g., a needy parent or child, a mistress or lover. This standard was developed by case law and the Spanish code; the vagueness of it produces a variety of results:

Washington -- any gift of c/p by one spouse to a third party requires the express or implied consent of the other. Case law exempts "trifles" from the requirement. The non-donor spouse can sue for 100% recovery from the person who received the gift. The gift without consent is "wholly void."

California -- no gift of c/p can be made to a third party by one spouse without the written consent of the other. The gift is merely voidable; therefore is valid unless the non-consenting spouse sues for recovery. The non-doning spouse can sue the person who received it for 100% of the gift during the donor's lifetime or for half of it after his or her death.

In both California and Washington the non-doning spouse can sue the donor spouse (or his or her estate) after dissolution for recovery of half the value of the gift.

British Columbia proposal -- recommends implied consent for gifts below $2000 and written consent for gifts of $2000 or more. A gift given without consent is voidable only.

b. Neither the California or Washington requirements appear satisfactory: written consent for all gifts seems unrealistic and 100% recovery for a "wholly void" gift may not protect a third party bona fide purchaser who has given valuable consideration to the donee. The British Columbia recommendation appears to be a compromise and better solution than either of the others. The figure of $2000 should be discussed if this solution is accepted.

3. Management of property which is partially community and partially separate.

If ownership of property is apportioned under California rules, the question arises -- is management and control also apportioned? None of the states appears to have any statute on this problem,

except New Mexico's sole control by title-holder statute. The British Columbia proposal recommends that an interest acquired by contributing funds does not give rise to management rights. This appears to be reasonable, because if equal and concurrent management is desired, all the couple needs to do is contract or agree to it or place it in joint ownership. If there is no agreement, the law simply grants management to the original title-holder and thereby solves ambiguity for third parties attempting to transact regarding the property.

D. COMMUNITY BUSINESS PROPERTY

Because a community (family) owned business is "owned" by both spouses, the introduction of equal control and management created a new tension between the need to allow one spouse the freedom to operate the business on a day-to-day basis without the obstacle of obtaining frequent consent of the other spouse and the need to protect the interests of the other spouse as owner under c/p principles by assuring that the operating spouse does not alienate major assets to the detriment of the community.

1. Where both spouses participate in operating the business, either spouse can transact concerning community business property, with these exceptions: Washington's statute of 1972 requires both spouses to consent to the acquisition, transfer or encumbrance of the assets (including real estate) or goodwill of the business. California requires joinder to dispose of the real estate. Neither makes an exception for dealers in real estate, although the spouses could, presumably, execute cross powers of attorney. British Columbia recommends that joinder of both spouses be required

for disposal of substantially the whole of the undertaking and for real estate dealings, except where real estate is the commodity of the business.

2. Where one spouse only operates the business, the participating spouse is sole manager. Washington provides that one spouse has full powers to operate "in the ordinary course of business" and California requires joinder only for real estate transactions. British Columbia recommends the same limits for real estate and major assets where either both or one spouse participates in the operation of community business.

* POLICY DECISION -- Should management and control of community business property be treated separately from general management rules, and if so, how?

Neither California nor the Washington statute is satisfactory, because: (a) the Washington statute is sufficiently vague to invite much litigation[19]; and (b) neither California nor Washington provide protection for the non-participating spouse against alienation of major business assets. New Mexico has recently repealed[20] its legislation regarding community business property and if no new legislation has been passed since then, general c/p management rules apply.

Recommendation: The British Columbia proposal appears to resolve the major problems with the California and Washington statutes, by extending protection to the non-participating spouse against alienation of the major

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19 Cross, "Equality for Spouses in Washington Community Property Law -- 1972 Statutory Changes," 48 Wash. L.R. 527 (1973) at 538.

20 The New Mexico statute embodied a presumption of male management and a registration requirement for manager-wives. This was unconstitutional under New Mexico E.R.A.

portion of business assets in addition to real property assets, by providing for exemption of real estate businesses and by avoiding the vague standard in Washington's statute.

E. HOLDING PROPERTY TOGETHER OTHER THAN IN COMMUNITY

General Principle

Spouses can hold property jointly in ways other than c/p, for example, as joint tenants or tenants in common.

The presumption is that husband and wife hold all property as c/p and the "mere language" on the conveyance of a different holding is not binding -- both spouses must know of the tenancy language, understand the meaning and agree to it.

* POLICY DECISION -- Should any special restrictions be placed on the holding of property in a different form than c/p by spouses?

Considerations

Consequences of different tenancies include variations in creditors rights, right to will, disposition at death, taxation, management and control. For example, if real property is held as c/p, disposing of one spouse's share requires joinder of both spouses; at death, the property passes under rules governing c/p rather than s/p; and at divorce, distribution is governed by c/p division. If the property is held together as tenants in common or joint tenancy as the s/p of each spouse, then the rules governing disposition, inheritance and division of s/p apply. Statutes prescribe various implications and the courts place varying weight on the presumption of c/p.

A few variations:

Washington -- joint tenancies are abolished, c/p presumed.

California -- courts disfavor joint tenancies and even if the instrument describes the property as a joint tenancy, very slight evidence is needed to show that the intent of the parties is to hold as c/p (including oral agreement).

New Mexico -- property held by spouses as joint tenants or tenants in common is allowed and each interest is deemed to be the individual spouse's s/p.

Recommendation: Property holding is a complex area and needs further research on the specific implications of each type as it relates to c/p. Whether or not a new c/p statute should prohibit joint tenancies should be considered, because joint tenancy is a popular method of holding property (the survivor owns all the property) yet is not favored by many courts and commentators and does impinge on the community scheme by changing management rights, survivorship rights and divorce division rules.

F. FIDUCIARY RESPONSIBILITIES OF SPOUSE ACTING AS MANAGER OF THE COMMUNITY

Basic Principle

The managing spouse's power to deal with c/p is limited by fiduciary-type standards. (This is a high standard of honesty and good faith where persons act for others and trust and confidence are involved.)

Most states place a "good faith" or fiduciary standard on managing powers by statute or by case law. The cases, however, generally are from the period of male management and generally are part of suits at dissolution of the marriage. Although strict fiduciary standards may be required at divorce, suits for

mismanagement during marriage have found the courts setting a limited standard for fiduciary duty and "cases where wife has prevailed are most rare."[21] In California, where the court has declared that, "a wife can sue her husband directly whenever necessary for the protection of her property rights," it is unlikely that the wife will be given relief unless she can show "bad faith" on the part of the husband, even against the most foolish and risky investments of community funds.[22]

It is not yet clear whether courts in the c/p states with equal management will entertain suits by one spouse against the other for mismanagement during the marriage, but commentators have speculated that the statutory language does create a cause of action for this ("fiduciary duty" in New Mexico and "good faith duty" in Washington). This needs further research.

* POLICY DECISION -- Should a cause of action be created for spouses against each other for breach of fiduciary duty or mismanagment of c/p during marriage? If so, what standard is to be required and what remedies are to be allowed?

Considerations

Commentators generally agree that a spouse must have a cause of action against the other spouse for mismanagement -- without this right, the right to equal ownership and control is an empty right, a non-wage earning spouse whose mate is withholding or dissipating

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21 Reppy, p. 355.

22 Reppy, p. 355; Wagner, "California's New Community Property Law -- Its Effect on Interspousal Mismanagement Litigation," 5 Pac. L.J. 723 (1974).

community funds will have no recourse other than divorce. S/he may be little better off than a non-wage earning spouse in a s/p state.

There are several different situations where one spouse can be injured by the actions of the other:

1. Transfers, conveyances and encumbrances of c/p by one spouse when joinder is required and has not been received. The tension in this situation is between protecting bona fide purchasers or creditors and protecting the non-signing spouse from fraud. (See section on debt liability for effects of nonjoinder, p. 38).

2. Alienation or disposition of c/p in fraud or injury of the other spouse. The general rules place a burden on the party asserting wrong to show bad faith on the part of the other. A presumption or implication of bad faith arises if the alienation is made for inadequate consideration, is a large gift without reason, or is excessive in proportion to the amount of the community income or assets. It includes one spouse going surety for a third party.

3. Wasting community funds -- for example, excessive gambling losses, large gifts to a third party, illegal acts, or dissolute living. (In one divorce property division a wife recovered half the funds her husband spent on several trips to Europe.)

4. Spending community funds to pay premiums on an insurance policy with a third party beneficiary.

5. Withholding management rights from the other spouse.

Each of these situations may be the prelude to divorce, but they may also be evidence of <u>different</u> problems which may be diminished or solved by the authority of the court. Thus far no cases have have been found which involve situations that have been resolved by courts other than in divorce actions. It is

possible, however, that there could be instances where one spouse is managing the community funds in such an irresponsible way that the financial situation of the family is placed in jeopardy yet neither party wants a divorce. Remedies could range from a court order to allow joint management or to refrain from certain acts, to recovery from third parties of wrongful gifts or reimbursement to the injured spouse from the other spouse, or to voiding the transaction. Each situation would have different considerations.

Recommendation: Further research into this area, particularly into standards of responsibility and into cases which may have arisen in states with equal management.

INTERSPOUSAL CONTRACTS

A. SEPARATE PROPERTY STATES

In separate property states most marriage contracts are looked at with disfavor. Contracts which alter the "essential incidents" of the marriage relationship (the husband's duty to provide financial support and the wife's duty to provide services) have traditionally been held void because they were deemed to violate public policy. In Wisconsin at the present time, enforcement of interspousal contracts without traditional consideration is not regulated by statute and consequently is subject to common law property rules as interpreted by the courts. The Wisconsin Supreme Court has never upheld a contract modifying support rights or family service obligations of a spouse. Contracts involving less essential incidents such as inheritance rights have

been enforced on a case-by-case basis[23] only after strict scrutiny of the contract itself and of the circumstances surrounding it. Some antenuptial contracts "may be considered" in making a property division upon divorce.[24] At best present Wisconsin law concerning interspousal contracts can be termed uncertain.

B. COMMUNITY PROPERTY STATES

The general rule concerning interspousal contracts in c/p states is that the statutory provisions of c/p rules apply unless altered by a valid contract between the spouses. All states except Texas allow antenuptial contracts which alter or supercede the statutory property rights. Each state has its own variation, but, in general, husbands and wives can contract with each other either before, at the time of, or during marriage as to the manner in which they wish to share the property earned or gained during marriage.[25] The spectrum of acceptance and enforcement of interspousal contracts ranges from California to Texas: in California, a high value is placed on individual freedom to contract and, hence, there is an easy acceptance of the validity of interspousal contracts, including oral contracts; in Texas, it is difficult, if not impossible, to alter the statutory property scheme.[26]

Rules concerning enforcement of interspousal contracts differ

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23 See, for example, Estate of Beat, 25 Wis.2d 311, 130 N.W.2d 739 (1965); Shetney v. Shetney, 49 Wis.2d 26, 181 N.W.2d 516 (1970).
24 Kunde v. Kunde, 52 Wis.2d 559, 191 N.W.2d 4a (1971).
25 DeFuniak, p. 334.
26 Reppy, Chapter 9, p. 409.

in various c/p jurisdictions according to whether the contract was made before or during the marriage and according to the subject matter of the contract. Where allowed, contracts concerning property rights can provide such things as: how property is to be held, as separate or community; how earnings are to be held, for example, one or both spouses' earnings can be separately owned rather than c/p; how property is to be divided at dissolution, for example, a marital contract formally executed may be made in lieu of a will. Contracts can change the status of any property from separate to community or vice versa during the marriage (transmutation agreement); determine management rights; or determine that there will be no community property at all.

Freedom to contract, however, is not unlimited. The following are some of the limits placed on interspousal contracts:

1. Requirement of writing: If the contract concerns real property, all states (except California as between spouses) require that it be written. If the contract is made during the marriage and concerns a change of status of personal property, no writing is required in California and in many cases no writing is required in Washington or New Mexico, especially if the contract has been performed or ratified during the marriage.[27]

2. The duty of one spouse to support the other cannot be contracted away or reduced.[28]

3. An antenuptial contract which provides for property division at divorce may be void as against public policy. Nevada will, however, enforce them.

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27 DeFuniak, p. 337.

28 See, for example, In re Marriage of Higgason, 10 Cal.3d 476, 110 Cal. Rptr. 897, 516 P.2d 289 (1973).

4. Because of the confidential relationship between spouses, contracts may be void because of duress, overreaching, failure of full disclosure, or fraud on one spouse.[29]

5. Contracts which are in fraud of creditors are void.

6. If the contract concerns real property, it may not be binding on third parties unless it is recorded in the county where the property is situated.

* POLICY DECISIONS -- 1. What kinds of interspousal contracts should be allowed? Should there be a limit on the subject matter of contracts?

2. On what grounds may one spouse attack the validity of an interspousal contract?

3. Should there be a requirement of writing? If so, should this requirement differ for different kinds of contracts?

4. What should be the requirements for valid contracts?

5. Should the spouses be given a statutory right to an action on the contract during the marriage as well as at dissolution?

6. In what way will third parties, especially creditors, be protected or given notice?

7. Should there be a central registry for marital contracts?

Recommendation: The right to make legally binding contracts concerning property is an extremely important right for spouses and should be the subject of careful research and discussion. This right has long been accorded to spouses in most c/p states and the experience in those states can be important in devising new statutory rules.

Because of the wide range of financial and family situations, no single statutory scheme for marriage can meet the needs of all couples. Interspousal contracts can provide a means for married couples to plan their own arrangements to match their individual circumstances.

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29 See, for example, Friedlander v. Friedlander, 80 Wash.2d 293, 494 P.2d 208 (1972).

CREDITS AND DEBTS

A. CREDIT FOR WIVES

Acquisition of credit by wives under federal Equal Credit Opportunity Act (ECOA):

Because state property laws are considered by the Act, some differences will exist between separate and community property states in credit transactions for wives. State property laws are pre-empted only if they are inconsistent with the federal law.

The ability of a non-earning wife to obtain credit should be most improved in c/p states with equal management rights, because there the wife not only owns half the community assets, but also can obligate the whole community. Her creditworthiness in those states can be based on the entire community -- not only its assets but on both husband's and wife's earnings (unless she is contracting for a separate debt -- a debt secured on her s/p and for use concerning her s/p or separate interests). Because the basis of the wife's creditworthiness may be the husband's earnings, a creditor is allowed to inquire about her marital status.

Reports from New Mexico, California and Washington confirm that non-wage earning wives are being extended credit by major banks, in the women's name alone based on the credit of the community. There have been no problems reported yet.

The following is a comparison between community and separate property provisions in the ECOA:

Hypothetical Situation	Community Property State	Separate Property State
non-wage earning wife wants separate account	may be creditworthy on her own by virtue of her interest in community	may not be able to get credit without relying on husband's property
	marital status may be inquired about	marital status may not be inquired about
	if relying on community information about spouse may be used	if relying on spouse's income information about him may be used
wage earning wife wants separate account not for her husband's use	inquiry about marital status allowed	inquiry about marital status allowed only for secured credit or where state finance charge ceilings apply
	information about spouse may be considered (Sec. 202.5)	information about spouse not considered unless relying on spouse's income

B. WHO OWNS PROPERTY OR FUNDS ACQUIRED ON CREDIT?

General Rule

Money borrowed or purchases on credit are presumed to be c/p; this presumption is rebuttable.

Considerations

California and Washington follow the general rule that credit purchases or borrowed funds are c/p. Rebuttal of the presumption is by proof that the lender relied on the borrower's s/p as security for the loan. How the acquired property is used is part of the proof, that is, whether the item is used exclusively for separate

purposes or is used by the community.

New Mexico has added a new statute which allows a spouse to obtain credit separately by identifying in writing at the time of acquisition that this is a separate debt. In case of default, then, the other spouse's property is protected and the creditor is put on notice that the amount of property available is limited.

Recommendation: That serious consideration be given to the New Mexico statute as a guideline. The identification requirement may result in fewer separate debts (and therefore more community debts where creditors have more assets on which to levy), but the New Mexico requirement may resolve the vagueness and uncertainty which result from reliance on motives of lenders.

C. DEBT LIABILITY

Basic Principle

Like a business partnership, marital partners share both losses and profits from community/partnership business, but are also protected from the separate losses of the other partner.

1. Liability for Community Debts

Since both profits and losses are shared, the whole community is liable for all community debts. The basic presumption is that all debts incurred during marriage are community debts. When there are questions about the status of a debt, case law (in New Mexico, a statute) generally determines whether the debt is separate or community.

Once the debt is characterized as community, then statutes determine how much liability has been incurred by each spouse,

above and beyond the shared c/p. If both spouses have contracted for the debt, then all of the c/p plus all of their s/p is usually liable. If only one spouse has contracted for the debt, the statutes vary:

California: (managerial system) All property subject to the debtor's management is liable. This protects the s/p of the non-contracting spouse. This rule applies to all debts, whether separate or community.

Washington: (community-debt system) If the debtor is acting outside the scope of community affairs, then the debt is a separate debt. If it is a community debt, the whole community plus the contracting spouse's s/p is liable. An exception is made for family expenses and the education of the children -- for these expenses the whole community plus the s/p of each spouse is liable.

New Mexico: Statutes carefully and narrowly define separate debts, all other are community debts. Community debts can be satisfied first from the c/p, second from the spouse's residence and third, from the s/p of either or both spouses.

There are exceptions and variation from these general rules within each state, for example, protection of the family residence or minimum protected assets.

2. Liability for Separate Debts

Separate debts are those acquired before marriage (antenuptial debts) or those acquired by a spouse for his or her separate use (e.g., to purchase or improve s/p), or those acquired by a court judgment specifying that it is a separate debt.

General Rule

The s/p of the debtor is always liable, but the s/p of the

non-debtor spouse is not liable for the separate debts of the other spouse.

Originally, the community itself was not liable for separate debts of the spouses, but this created much unhappiness on the part of creditors, because persons with unsecured antenuptial debts (and no s/p) who got married and had only community income after marriage attained "instant bankruptcy" because there was no s/p on which the creditor could levy. In the case of support payments for children of a prior marriage (an antenuptial debt) the problem was especially poignant.

Some solutions:

Washington -- The community is not liable for antenuptial and separate debts with two exceptions. Earnings are subject to previous divorce decree obligations and the c/p is liable for income taxes accrued before marriage. All other antenuptial debts are to be paid from the debtor's s/p or from his or her half of the c/p upon dissolution.

California -- Each spouse's s/p and earnings are exempt from liability for antenuptial debts of the other spouse; the debtor's earnings, s/p and any c/p under his or her management are liable. Commingling of earnings results in liability for both earners.

New Mexico -- A system of priorities is set up from which a separate debt can be satisfied -- ultimately a creditor can reach all the s/p of the debtor plus his or her half of all the c/p, including the residence.

Recommendation: The area of credit and debts is an exceptionally complicated area which needs careful research and consideration. The basic policy decisions involved should strike a balance between protecting the family and protecting creditor rights.

Separate Considerations Within the Credit and Debt Area

1. A special situation occurs where one spouse goes surety for a third party. Usually, the community is not liable in this event, but the Washington courts have imposed liability when a husband incurred surety liability in the course of his law practice. This should not be a risk which the community must bear unless both spouses join in the surety.

2. Another major consideration is bankruptcy because of the three types of property and the two types of creditors. Federal Bankruptcy Acts cover this, but state law applies in some cases. Considerations in this area involve priorities, whether one spouse could be separately bankrupt while the community remains solvent, and vice versa, and the extent to which a discharge of community bankruptcy affects the spouses' separate debts. This area, too, needs more research.

D. TORTS

There are three major aspects to tort actions: liability, recovery and capacity to sue. Considerations involve whose property (separate or community) is liable for tort damages for which one of the spouses is responsible and who receives the benefit from a tort recovery by one of the spouses (the community or the injured spouse).

Liability for Tort

Originally the tort liability of one spouse could not cause the other spouse to lose his or her s/p or half of the community. Today, although the innocent spouse's s/p is protected, the trend is toward finding liability for the whole community.

Basically, tort liability is treated like any other debt and falls within the general rules of debt liability. The court determines whether or not this was a "separate" or "community" tort based on flexible standards such as whether the tort was committed on "community" or "separate" business. Once the nature of the act is determined, then general debt liability rules usually apply.

Recovery

If one of the spouses has recovered for property damage, there is no problem because the recovery simply belongs to the owner of the property. If, however, the recovery is for personal injury, there are problems concerning who owns the recovery -- the injured spouse or the community. The majority rule is that recovery for personal injury is "property" acquired during marriage and as such is c/p. This has, however, given rise to other problems.

In situations where the husband (could be either spouse) is the negligent driver, the wife is the passenger and is injured, some courts have imputed this negligence to the wife, thus precluding her recovery or diminishing it if comparative negligence is used. The reasoning is that if the wife recovers and the recovery belongs to the community, then the husband has benefitted from his wrongdoing. On the other hand, if recovery is wholly separate, then the community may not be compensated for losses due to medical expenses or loss of wages.

The best solution appears to be New Mexico's: a cause of action for personal injury is compensation for violation of a

personal right -- the right to bodily security. This is an individual right, brought to the marriage; therefore, recovery for pain and suffering is s/p. The community, however, has the right to be compensated for all financial damages suffered by it.

The Washington courts have divided recovery from one spouse by the other in the same way as New Mexico has above, with the exception that recovery for loss of future earnings was reduced by half.[30] In this way recovery can be allowed without at the same time allowing the tortfeasor to benefit from his or her wrongdoing.

Several states term recovery for injury or disease under Worker's Compensation and similar plans the s/p of the injured spouse. Texas, however, divides this recovery more fairly. If the recovery is in lieu of a salary, it is c/p and that portion can be divided at divorce. If the recovery is for pain and suffering, it is the s/p of the injured spouse.

Capacity to Sue

With equal management and control of the community either spouse can sue or be sued on behalf of the community (in Washington, even if the other spouse objects). If the suit involves real property which requires both spouses to join in all transactions then both spouses must be parties in the suit. Actions between spouses involving personal injuries are allowed by most c/p states; only a few states retain the old common law interspousal immunity. California and Washington have abolished interspousal immunity completely; New Mexico allows interspousal actions for intentional torts and negligence.

30 500 P.2d 776.

DISSOLUTION OF THE COMMUNITY

Dissolution of the community occurs upon divorce or separation, at the death of one spouse, or upon partition of the c/p without dissolution of the marriage.

Dissolving the community involves segregating the c/p and community debts from the s/p and separate debts of each spouse. Assets of the community are then divided between the spouses.

At dissolution (from any cause), the community becomes subject to all debts charged against it and these debts must be ascertained before the community can be valued for division between spouses. Statutes generally provide for debt payment before partition or declare that each half is liable for community debts to protect both heirs and creditors. The fact that treatment of debts at dissolution varies from state to state allows considerable choice in the development of this section of any model system. Claims made by one spouse against the community or the other spouse's s/p are generally given priority over other creditors in the statutory listings of creditor priorities.

A. DISSOLUTION BY DIVORCE

Wisconsin

Current state law permits the court granting a divorce to divide and distribute all real and personal property belonging to either party, based on a number of considerations including the length of the marriage, the age and health of the parties and

other factors indicating need.[31] In the traditional situation where the husband has been the family's sole breadwinner, the wife usually retains her own property (usually an insubstantial amount) and is granted approximately 1/3 of her husband's property (generally more substantial), with property owned by the parties as joint tenants being figured into the determination of their estates. However, in cases where the marriage was of long duration or the husband was guilty of misconduct, the Wisconsin Supreme Court has approved a 50/50 property division.[32] Antenuptial agreements regarding the division of property in the event of divorce, though void, may be considered by the court in determining the equities of the situation.[33]

Community Property States -- Community Property

The general rule is that c/p is to be divided equally between the parties at the time of divorce. C/p states apply one of two major theories in determining how the property is to be divided:

1. Item theory:

   According to the item theory, husband and wife are each entitled to a ½ interest in each asset owned by the community. Thus, upon divorce, they would be tenants in common, each owning ½ the house, ½ the business, ½ the savings account, and ½ the stocks which had previously been owned by the community. All states apply this theory to the extent that

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31 Wis. Stat. sec. 247.26.
32 Lacey v. Lacey, 45 Wis.2d 378 (1970); Parsons v. Parsons, 68 Wis.2d 744 (1975).
33 Kunde v. Kunde, see note 24.

it covers any c/p omitted from the divorce court's order assigning property rights.[34]

2. Aggregate theory:

This theory permits the divorce court to give full ownership of different assets to the respective parties, so long as their value is equivalent. Using the example above, wife might get the house and stocks, while husband receives the business and savings account -- assuming that they balance out at equal value.[35] In states permitting this theory, it is the preferred method of partition since the residual bond of concurrent ownership is "an unwelcome vestige of the dissolved marriage."[36] Louisiana , the only state not permitting the aggregate theory, allows partition in kind (e.g., dividing a one-acre piece of land into two ½-acre plots) or judicial sale where the former spouses cannot agree on a division of c/p. One advantage of this approach is that it eliminates sex stereotyping in the court's property award, where, for instance, the wife gets the house and the husband gets the business. The disadvantage is that additional court action is required.

3. Modification of 50/50 division:

California and New Mexico flatly require an equal property division.[37] However, Arizona, Idaho, Nevada, Texas and Washington permit modification of the 50/50 starting point, whether the item theory or the aggregate theory is employed.[38] Justifications for an unequal division may include need, marital misconduct or the more substantial contribution of one spouse to the acquisition of the community's assets.[39]

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34 For example, La. Civ. Code art. 2406.
35 Cal. Civ. sec. 4800(1); In re marriage of Knickerbocker, 43 Cal. Ap.3d 1039, 111 Cal. Rptr. 232 (1974).
36 In re marriage of Knickerbocker, see above.
37 Cal. Civ. Code sec. 4800; Michelson v. Michelson, 86 N.M. 107, 520 P.2d 263 (1974).
38 For example, Idaho Code sec. 32-712.
39 See Nev. Rev. Stat. sec. 125.150.

However, this justification seems inconsistent with the basic theory that husband and wife "earn" c/p equally as a matter of law, since individual contributions can't be accurately valued or quantified.

Community Property States -- Separate Property

The general rule is that upon divorce s/p goes automatically to the spouse who owns it. This rule creates great hardship in the case of the "community without community property" -- where one spouse, through inheritance or work done prior to the marriage, has accumulated enough wealth to live on and in consequence no income is earned by either spouse during the course of the marriage. At the time of divorce (as well as upon death), the poor spouse is left penniless because there is no community wealth to be divided -- in total conflict with the principle that nonmonetary contributions to the community deserve legal recognition and have economic worth.[40] To counteract this problem, Texas and Washington permit division of s/p upon divorce.[41] It appears desirable to be consistent in dealing with this problem whether it arises because of death or because of divorce.[42]

At What Point is the Community Considered Dissolved?

The question of whether c/p should continue to accumulate between the filing and granting of a divorce is particularly problematic in Wisconsin because of the length of the pendency period, which is a minimum of four months. The same problems

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40 See the example of the Beam case, pp. 28-29.
41 Reppy, p. 466.
42 Other suggestions to resolve this problem are discussed in the Classifiction section, pp. 22-33.

are raised when a couple decides to separate voluntarily, perhaps in order to establish a ground for divorce -- in which case they must live apart, though remaining technically married, for at least a year. Anne Bingaman has suggested that the community should continue to remain in effect and should accumulate property during such a period of separation, in order to provide income to a homemaker spouse caring for children. However, others have urged that the community be considered dissolved so that the homemaker becomes eligible for Assistance to Families With Dependent Children (AFDC) and can receive some protection from the state in the event that the wage earner spouse refuses to relinquish total control of the community income. A further policy consideration is whether presuming that the community is dissolved raises an impediment to possible reconciliation and consequently could be considered as contrary to good public policy. While the parties may contract concerning this issue, there must be a general rule that can be applied in cases where no contract has been made.

* POLICY DECISIONS -- 1. Should the item theory, the aggregate theory, or some combination of the two be applied in dividing c/p at the time of divorce?

2. Should modification of the presumed equal division of c/p be permitted? If so, should the court's power be limited to making an unequal distribution of c/p, or should it be able to transfer ownership of s/p as well?

3. Should the community be presumed to be dissolved at the time husband and wife stop living together? Does it make any difference whether the decision to live apart was mutual or unilateral? Should the community be presumed to be dissolved at the time one spouse files for legal separation or divorce? Or should the community be presumed to continue until dissolved by legal decree?

B. DISSOLUTION BY DEATH

Basic Principles

1. Community Property:

Each spouse has testamentary powers over his or her half of the c/p. In the absence of a will, in California, Idaho, New Mexico, and Washington, the surviving spouse inherits, as heir, all of the decedent spouse's interest in the c/p. In the other four c/p states, the decedent's issue or other kin inherit part or all of decedent's share of the community. In all states the surviving spouse retains ownership of half the c/p -- this retained half is not inherited and is not part of the deceased spouse's estate.

2. Separate Property:

Each spouse has unrestricted testamentary powers over his or her s/p. There exist wide variations in the intestate succession laws from state to state.

Considerations

The most important concern in this area, of course, will be the impact of c/p on existing probate laws. The two major problems at dissolution by death in the c/p states involve the widow or widower who is left with a very small community, even though the decedent spouse had much s/p, and the "widow's election" wills. In addition, problems may be encountered because c/p principles have a special effect on life insurance policies.

1. Widow or Widower left with a very small community

Because the surviving spouse retains ownership of his or her half of the c/p, there are no "forced share" statutes to protect spouses from disinheritance as in s/p states. Only Louisiana has some small protection for a widow whose husband had

accumulated s/p, but little or no c/p -- there, if the husband "dies rich" and leaves his widow "poor," she can claim one-fourth of his separate estate. Omission of a forced share plus the absence of "quasi-community"[43] provisions in most states combine to create a severe disadvantage to widows who have little or no c/p. This can occur either because the husband was separately rich or because the couple moved to the c/p state after accumulating most of their property in a s/p state where the husband owned the property. Suggestions to resolve this problem are discussed in the section on classifiction.[44]

2. "Widow's Election" Wills

The second problem encountered in c/p states involves the "widow's election" will. This is a will whereby the husband (in most cases) purports to dispose of more than half of the community. Usually, he places most or all of the community assets in a trust fund, giving the income to his wife for life and the property itself to the children at her death. This forces the widow to "elect" against a will in order to claim her half. Unlike an election against a will in Wisconsin, where the surviving spouse makes a claim against the deceased spouse's property by the election, the c/p widow's election is for her own property. If she agrees to the will, she has agreed to a transfer of her own property to the ultimate beneficiaries underher husband's will in exchange for the income provisions of the trust. There are major tax consequences of this election.

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43 See section on Migratory Couples, p. 70 for explanation of "quasi-c/p."

44 See pp. 30-31; 69-71.

The normal rule of wills is that a testator intends to dispose of only his or her property and if more than half of the community is willed by mistake, the will is not enforced. The exception to this rule, the "widow's election" will, is a common, accepted practice. Presumably, the justification is based on male management of the community and a correlated non-finance-minded wife.

It seems most fair that any attempt by one spouse to dispose of more than half of the community by will should be prohibited. Perhaps some method can be found to allow exclusion of the survivor's half of the community in the event the decedent spouse's will purports to dispose of more than half the community, without defeating the entire will.

3. Insurance policies and their proceeds

C/p states view life insurance as an investment which belongs to the community. There are many variations, but there are some general rules:

a. Ownership of the policy and of the proceeds are determined by whether the policy was taken out before or after marriage and what funds were used to pay the premiums.

b. An insurance policy taken out after marriage with premiums paid by community funds is a community asset. The proceeds are c/p.

c. If the policy is taken out before marriage and both separate and community funds are used to pay the premiums, there are two methods of computing reimbursement to the community: reimbursement is from the proceeds either in the amount of c/p funds used to pay the premiums, or in proportion to the amount of c/p funds used.

d. An insurance policy on the life of a spouse that names a third party as beneficiary is generally viewed as a gift if community funds are used to pay the premiums. If the uninsured spouse consents to the gift, no problems arise and the beneficiary owns the proceeds. If no consent is given, however, results are different. If the policy is taken out during marriage and community funds are used to pay the premiums, the surviving spouse owns (or can recover) one-half the proceeds and the named beneficiary owns the other half. Washington, however, allows the non-consenting survivor to recover 100% of the proceeds, even if the third party beneficiary is a needy parent or child. In all states, if the uninsured spouse dies first, his or her heirs receive this benefit.

Many of the life insurance rules arose under the husband-manager system and are not now entirely applicable. More research is necessary to ascertain how equal management affects the rules, what necessary minimum rules are needed and what alternatives are available.

C. PARTITION OF THE COMMUNITY WITHOUT DISSOLVING THE COMMUNITY

Dissolving the community but not the marriage can occur in two situations -- upon petition to the court by one or both spouses or upon involuntary partition forced by creditors in order to reach a debtor's half of the community.

1. Involuntary Partition: New Mexico statutes expressly allow involuntary partition for debt satisfaction. The non-debtor spouse must file a claim for exemption of his or her half (if the levy is for a separate debt of the other spouse) or the creditor can levy against the whole community. In this event, the non-debtor spouse must recover from the debtor spouse. California and Washington, on the other hand,

do not allow involuntary partition (except in a rare case for child support).

2. Voluntary partition: California allows the court to divide the community the same as in a divorce action, upon petition of either spouse for separate maintenance. Where the spouses can contract between themselves to effect any division desired or to contract out of the community, no court action is necessary. Consideration should be given, however, to whether an action similar to the California voluntary partition proceedings should be created for those spouses unable to agree on the details of the division, but desire partition without divorce.

MIGRATORY COUPLES

Normal conflict of law rules generally apply to problems raised when couples move from state to state or settle in different states. The usual rule is that the law of the domicile state at the time of divorce or death determines how the property is to be divided. The domicile state at the time property is acquired, however, determines whether property is separate or community. Real property is governed by the laws of the state in which it is situated.

A. MOVE FROM S/P TO C/P STATE

The initial rule is that property brought into a state retains the character (as s/p or c/p) that was applied to it in the state where it was acquired. Problems and inequities can arise, however, when rules governing "separate" property in the c/p

state are applied to property which has been labelled "separate" in a common law state. The most common example is the couple who live in a s/p state where all the property acquired is the "separate" property of the husband. Upon retirement, they move to a c/p state where the husband dies without a will and the intestate succession rules of this state give his "separate" property to heirs other than the wife.

California and Arizona have passed "quasi-community property" statutes which apply at dissolution by death, divorce or separation. Quasi-c/p is property acquired by the couple when they were domiciled in another state. At dissolution this property is characterized as if the couple had lived in the c/p state during their whole marriage. The only difference between quasi-c/p and ordinary c/p is that quasi-c/p comes into effect only at dissolution -- to provide equitable rules for divorce division of property or to effect a kind of "forced share" for the non-acquiring widow or widower. During the marriage, the non-acquiring spouse has no powers of equal management or control and has no testamentary powers over the property.

Recommendation: Subject to further research, it is recommended that when married couples move to a marital partnership state, marital partnership laws should apply to what they own as soon as they establish domicile and should apply retroactively to all property acquired by them. It is incongruous to apply part of two different systems to the same property. Labels and consequences are part of an integrated whole; only unfairness can result from confusing the two.

B. MOVE FROM C/P TO S/P STATE

The migratory couple moving from a c/p state to a s/p state encounter other problems concerning their property -- for the lawyer, the major problem is the inconsistency of the courts. Cases show that common law courts can allow the property to retain the c/p characteristics or can change ownership from the c/p form to a common law form of ownership. Courts most frequently change from c/p to tenancy in common.

There are few generalizations which can be made to predict what courts in a particular case will do -- the particular forum and the nature of the problem generally affect the outcome. For example, there may be a difference in court response to the protection of a penniless widow case versus a tax collector case.[44]

TO WHOM SHOULD COMMUNITY PROPERTY APPLY?

General Principle

A legal marriage and status of husband and wife are generally prerequisites to the establishment of a community of property. In all eight states, the legal community becomes operative at marriage or when a married couple becomes domiciled in the state.

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44 Dukemeier and Johanson, Family Wealth Transactions: Wills, Trusts Future Interests and Estate Planning, (1972) at p.553.

* POLICY DECISION -- Should c/p be extended to any relationship other than legal marriage?

The following are examples of relationships other than legal marriage which have had c/p applied to them.

Common Law Marriages. The c/p states which recognize common law marriages (Texas and Idaho) apply c/p to them. Other states also apply c/p to couples who have moved there from a state in which they have acquired a common law marriage.

Putative Marriages. When a couple has participated in a marriage ceremony but the marriage is void for legal reasons, for example, because one is already married, the general rule is that c/p is applied for the "innocent" spouse; the "wrongdoer" must share but the "innocent" spouse does not.[45] Innocence is defined as a good faith belief that there exists no legal bar to the marriage. Without this rule, the innocent, non-earning spouse could end up with no property rights after several years of marriage.

California -- If both spouses are innocent, c/p is applied. The innocent spouse can claim half the property at the death of the other or upon termination of the relationship. Putative wives have also been allowed to recover on a quantum meruit (value of services) basis.

Washington -- The innocent wife may recover half of the c/p on a partnership theory, based on the equitable powers of the court. If both spouses were in "bad faith," no right to share arises, unless proof of a business agreement is shown.

Meretricious Relationships -- In general, couples who cohabit without a marriage ceremony or where both knew the ceremony was

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45 DeFuniak, p. 107.

invalid do not establish a community and acquire no right to share in the earnings of the other. It is possible, however, for cohabiting persons to seek relief under tort law (suit for fraud), contract law (express or implied joint venture agreement or implied contract to pay for services rendered), or principles of equity and unjust enrichment (e.g., a constructive trust). California has applied c/p to a meretricious relationship because of the "spirit of the family code."[46] Washington has applied c/p to a non-married farm couple who both contributed to their earnings on an implied partnership basis.[47]

It is also possible to extend c/p rules to two cohabiting persons who privately contract with each other making the same terms as c/p. They would probably not, however, be able to split income for federal taxes.[48] The British Columbia proposal recommends that non-married couples be allowed to contract to c/p terms because many couples are prevented from marrying by some legal bar.

Couple is legally married, but one spouse is absent. This can occur in several instances:

1. Temporary absences. These are recognized as having no effect on the community. (See section on Emergency Situations for instances where transactions which require both spouses arise during the absence of one.)[49]

2. Abandonment. In California, the spouse who has been abandoned

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46 In re Marriage of Cary, 34 Cal. App.3d 345, 109 Cal. Rptr. 862 (1973).

47 In re Estate of Thornton, 81 Wash.2d 72, 499 P.2d 864 (1972).

48 Comissioner v. Harmon, 323 U.S. 44, 65 S.Ct., 103, 89 L.Ed. 60 (1944).

49 pp. 39-40.

acquires a s/p right to all his or her acquisitions while the other spouse is away. This right should be extended only to the deserting spouse, who should also have a protected claim against the acquisitions of the deserting spouse.[50]

3. Pending divorce or legal separation. (See section on Dissolution by Divorce)[51]

4. Living Separate and Apart. This is the situation in which the spouses have agreed to a more or less permanent separation, in which there is the "absence of will to live together as man and wife and a lack of present intention to resume the marital relationship."[52] There does not need to be the intention to divorce. Both Washington and California deem all acquisitions while living "separate and apart" the s/p of the acquiring spouse.

CONSTITUTIONAL QUESTIONS AND TRANSITION

The major question is whether there will need to be a change in the constitution of a separate property state in order to initiate a form of c/p, especially if c/p is to be applied retroactively. Without retroactive application, it could take decades before c/p would actually be in operation and the change might result in an indescribable tangle of legal problems and litigation from having two systems in operation at once.[53] With the exception of one California case,[54] all decisions have held

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50 Cross, p. 533.
51 pp. 60-64.
52 Cross, p. 533.
53 Bingaman, "A Commentary on the Effect of the E.R.A. on State Laws and Institutions," (1975) at p. 235.
54 Addison v. Addison, 62 Cal.2d 558, 43 Cal. Rptr. 97, 339 P.2d 897 (1965), where California's quasi-c/p statute was found constitutional.

statutes which have attempted to shift actual ownership interests in marital property acquired by the spouses to be unconstitutional as a "taking" without due process.[55] Only strong public policy reasons can override a vested property interest.[56]

Bingaman has suggested that constitutional problems might be avoided by applying c/p to all new marriages after adoption, with retroactive application to couples already married in three aspects only:

a. as to creditors or other third parties who deal with one or both of the spouses concerning "family" or "community" debts during marriage.

b. between the spouses themselves at divorce.

c. as to the surviving spouse when one of them dies.

By applying these three aspects to already married couples, the major provisions of c/p are effected as to them and the change does not in any substantial way affect vested property rights differently from the way that s/p laws already affect them.[57]

Consideration should also be given to the British Columbia recommendation: retroactive problems there were to be resolved by giving all presently married couples the opportunity to opt out of the retroactive application alone, if opted for within six months of the beginning of c/p. Secondly, pending actions were not to be affected by retroactive application until six months after enactment of the bill. This proposed method should give each individual a choice as to whether to accept retroactivity or not and should result in a minimum number of marriages governed by both systems.

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55 Reppy, p. 537.
56 Ibid.
57 Bingaman, "A Commentary on the Effect of the E.R.A. on State Laws and Institutions, p. 236.

FEDERAL TAX TREATMENT OF COMMUNITY PROPERTY

From 1919 to 1948 community property was treated in a checkered and unpredictable fashion under federal tax rules. However, in 1948 in view of the spread of c/p legislation to new states, Congress decided to equalize the federal tax treatment of s/p and c/p states. In doing so, the IRS looked to the various state laws which defined c/p rights as 50-50 ownership. The Internal Revenue Code honored these property interests and allowed the c/p spouses to split the community income, to treat gifts to third parties as given half by each, and to include only one-half of the c/p in the gross estate of the first spouse to die. In the s/p states, spouses were allowed to split their combined income on joint returns, to split gifts to third parties, and to have an estate tax marital deduction on property passing to the surviving spouse of up to 50% of the gross estate.

The major difference that still exists between the s/p and c/p states with regard to federal taxation is the tax treatment of property divisions on divorce. C/p spouses are considered to each own half of the c/p, so that an equal division of their c/p is not a taxable event since neither has gained any value. In s/p states, the person who earned the income is considered to own it so that there is always a taxable division of property unless the division is exactly in proportion to the spouse's respective monetary contributions. So in property divisions, c/p spouses usually have an advantage.

Since 1948, the Congress and IRS have maintained the basic equality between s/p and c/p states for federal taxation. Generally if a new provision could work a hardship on one of the property systems, the provision contains a modification which equalizes the impact. Although there are many minor differences in computations and characterizations which are often caused by state property law, there is basic tax equality between the separate property and community property systems under federal taxation.

III

RECOMMENDATIONS FOR A MODEL DEFINITION OF MARITAL PROPERTY

This section makes four recommendations for the classification of property in a model marital property system.

1. "Marital Property" is:

   a. all property acquired by either or both spouses during marriage except that which is s/p.

   b. the rents, issues and profits, the natural increase* of all property owned by the marital partnership or by either spouse separately, unless expressly agreed otherwise by both spouses. (* tentative recommendation regarding natural increase).

   c. each spouse has an existing, present, undivided one-half ownership in all marital property. This ownership is by virtue of the marital partnership; contribution by dollar amount will not be considered when determining the amount of one spouse's share.

2. "Separate Property" is:

   a. property acquired by either spouse before marriage, and filed in a formal declaration of assets and debts at marriage. Full disclosure will be required.

   b. property acquired by either spouse during marriage by gift, bequest, devise or descent; a pure donation.

   c. property designated as s/p by a judgment or decree of any court having jurisdiction.

3. Presumption that all property is marital property.

   It is presumed that all property is marital property and the burden of proving that property is separately owned is on the person so asserting. Commingling of marital and separate property so as to make tracing of funds impossible converts s/p into marital property.

4. Reimbursement:

   It is presumed that all expenditures from separate assets for either family use or on the s/p of the other spouse are gifts, unless there is an express agreement to the contrary.

DISCUSSION OF RECOMMENDATIONS

Community property states determine ownership and allocate profits according to basic principles expanded by case law doctrine. The eight c/p states solve problems of classification and apportionment in different ways with varying results. In one writer's view, Louisiana jurisprudence in the area of apportionment is the "best developed and certain," while California's law is "confused and uncertain."[58] Our own view is that none of the eight c/p states have satisfactory rules with which to solve all the problems involved in the equitable determination of marital property rights, especially if we wish to create a "marital partnership," to recognize unpaid labor in the home by sharing all partnership profits, and to ensure equity at dissolution.

Because many of the recommendations are interdependent, the topics overlap. Although we have attempted to separate them as clearly as possible, some sections cannot be totally separated.

BASIC DEFINITION OF MARITAL PROPERTY

RECOMMENDATION:

1. "Marital Property" is:

   a. all property acquired by either or both spouses during marriage except that which is s/p.

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58 Bartke, "Yours, Mine and Ours -- Separate Title and Community Funds," 44 Wash. L.R. 379 (1976), p. 385.

This broad definition is designed to cover all property which does not clearly fit into the definition of separate property, and to correlate with the presumption favoring the marital partnership.[59] If there were two precise definitions -- one for marital property and one for separate property -- it is possible that some property could be acquired in a way that would not fit either definition. The marital property definition, then, is the "catch-all" one.

FRUITS OF SEPARATE PROPERTY

RECOMMENDATION:

1. "Marital Property" is:

   b. the rents, issues and profits . . . of all property owned by the marital partnership or by either spouse separately, unless expressly agreed otherwise by both spouses.

The community property principle that fruits of separate property belong to the owning spouse is based, in part, on placing a value on separate ownership. The original Spanish Code classified income from separate property as community property.[60] The rule that fruits of separate property are separate was the result of an early California case decided on the basis of a misunderstanding of Spanish law by men trained in common law. It was codified by the California

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59 Compare: Calif. Civil Code sec. 687; Wash. Rev. Code 26.16.030; New Mex. Stat. 57-4A-2(B).

60 DeFuniak and Vaughn, p. 116.

legislature and copied by four other states, Washington, Arizona, New Mexico and Nevada.[61] Recent proposals to change this rule, making the fruits belong to the community, are accompanied with doubts that such a major change will be accepted by the legislature.[62]

The courts of California must hold the world record for practicing the art of sifting through years of inadequate family records in order to distribute assets or determine ownership rights...and producing conflicting and sometimes inequitable decisions, which have precipitated articles calling for legislative reform. These inequitable decisions are the result not only of inconsistent rules, but stem from the workings of the system itself -- from the fact that fruits from a separate property source must be allocated to the separate owner.[63]

Separate ownership of the fruits of separate property means that only that part of the income which can be attributed to the labor of a spouse belongs to the community. If separate property is the major or only source of income for a family (for example from a separately owned business or investment), the amount of community property accumulated can be extremely small or non-existent. Where the fruits and natural increase of the separate property belong to the separate owner, only the return for the labor of that spouse belongs to the community; this return for the labor of the spouse can be valued at an unrealistically low amount

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61 King, "The Challenge of Apportionment," 37 Wash. L.R. 483 (1962).

62 Bodenheimer, "The Community Without Community Property: The Need for Legislative Attention to Separate-Property Marriages Under Community Property Laws," 8 Cal. Western L.R. 381 (1972).

63 Bartke; Bodenheimer; Helms, "Never Marry a Rich Man: The Lesson of Beam v. Bank of America, A California Apportionment Case," 13 Santa Clara Lawyer 121 (1972).

in relation to the actual profits of this separate business.[64] The rule escalates the number of problems encountered in apportionment.[65] If the fruits of separate property are used to raise the standard of living beyond the reach of community income (common practice), then the spouse owning this property has an unfair advantage to claim assets acquired during a period where it can be proved that community income was consumed by living expenses.[66] Doctrines designed to prevent inequities have not done so.[67]

To illustrate this: a basic doctrine is the presumption that community assets are used to discharge community obligations and separate assets to discharge separate obligations.[68] This is, at least in part, a correlate of the presumption favoring the community: all community assets are presumed to belong to the community and thus are presumed to have been purchased with community funds. These basic presumptions, applied to a family with small separate income, protects the community assets by forcing the person who claims certain assets are separately owned to prove it through clear tracing.

However, living expenses are also presumed to be a community obligation (the family expense doctrine) and, therefore, to have been discharged with community funds. Suppose only one spouse has

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64 See the Beam case, pp. 28-29.

65 Bartke; DeFuniak, p. 165; Bingaman, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," p. 4, fn. 8: the rule that fruits of s/p are separate results in the "difficult determinations" with which the courts struggle."

66 Cross, "The Community Property Law in Washington," 49 Wash. L.R. 729 (1974), p. 769.

67 Helms, "Never Marry a Rich Man: The Lesson of Beam v. Bank of America, a California Apportionment Case," 13 Santa Clara Lawyer 121 (1972).

68 Cross, "The Community Property Law In Washington," p. 769.

separate income: he or she proves that during 1973 community income was $10,000 and family expenses for that year were $12,000 and no debts were incurred: this spouse could claim that any assets accumulated during that year were purchased with separate funds without tracing his or her separate funds directly to it.[69] Even worse, in the Beam v. Bank of America case, Mr. Beam was allowed to show that family living expenses over the whole of 29 years of marriage exceeded the total community income during that period and claimed all the accumulated assets.[70] The court allowed him to retain $1,850,507 and awarded his wife nothing. The horrendous result in Beam stemmed largely from the fact that the family lived entirely on the income from separate assets (fruits of separate property belong separately to the owner in California), but the inequity was compounded by the way that the family expense doctrine was allowed to be used in this case.

Many suggestions and formulas have been offered to remedy these problems. But these suggestions are simply remedies -- the basic problem is the principle itself. Fruits of separate property should belong to the marital partnership, consistent with the goal of protecting and strengthening the family and with the principle that all property acquired during marriage belongs to the partnership. This will eliminate many of the problems involved in apportionment and will protect those persons whose spouses have much separate property used to support the family. Couples who do not desire or need this protection may contract into a system which fits their individual needs.

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69 See v. See, 64 Cal.2d 776, 415 P.2d 776, 51 Cal.Rptr. 888 (1966).
70 pp. 28-29.

NATURAL INCREASE OF SEPARATE PROPERTY

RECOMMENDATION:

1. "Marital Property" is:

   b. the . . . natural increase of all property owned by the marital partnership or by either spouse separately.

Louisiana, Texas and Idaho (while classifying fruits of separate property as community property) classify "natural increase" or "capital gains" of separate property as belonging to the separate owner.[71] This principle is based on the reasoning that natural increases are intrinsic to the property itself, are the result of purely economic forces rather than any labor and, therefore, do not represent "onerously" acquired assets. Unless the natural increase is the result of the labor of either spouse or the contribution of community funds, it belongs to the owner spouse.[72] The British Columbia recommendation is similar: "(T)he community claim to capital gain on separate property should be limited to that part of the gain that can be credited to the joint enterprise of the parties."[73]

Although this principle does not generate the same number of inequities as does the principle that fruits of separate property are separate, there are other problems and each state has much case

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71 Texas Civil Statutes, Art. 4613: "the increase of property (separately) acquired."
Louisiana Civil Code, Art. 2408, "increase . . . due to the ordinary course of things, to the rise in the value of property, or to chances of trade."
Idaho Code Ann. sec. 32-906.

72 DeFuniak, pp. 169-170.

73 British Columbia Proposal, p. 11.

law to define just exactly what a "natural increase" really is.

The following are examples of complicating rules:

a. The "constituents of property take on the character of the property itself, so that proceeds derived from the sale of timber, sand, gravel, stones, minerals and the like are of the same character as the property from which the items were derived."[74] This means that profits from the sale of these items from separate property belong to the separate owner as long as he or she doesn't do any work on it. Bonuses and royalties on separate property mineral interests are separate property in Texas.[75]

b. If community labor or industry contributes to the natural increase, the proportion attributable to their labor is community property. For example, the natural increment in the value of separately owned stock remains separate unless the activities of the owning spouse brought on the increase or part of it.[76] This rule has itself generated more rules: in Texas, if the increase is from "substantial" efforts of the community, the increase is community property; if the effort is "reasonable" (or there was no effort expended) for the preservation and maintenance of the property, the increase is separate.[77] Texas also has a welter of rules surrounding oil and gas interests.

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74 DeFuniak, pp. 163-4.
75 Id.
76 DeFuniak, p. 170.
77 Schofield, "The Effect of Community Time, Talent and Industry Upon Separate Property," 22 Baylor L.R. 527 (1970).

The point is: this principle -- that the natural increase of separate property belongs to the separate owner -- will spawn difficult tracing and apportionment problems and the marital partnership will have no claim to separate property profits if no labor or community funds are expended on it by the spouses.

The central issue is how great a value will be placed on the preservation of separate assets? It is possible that if all fruits, capital gain and natural increase are to belong to the marital partnership, the spouse owning separate property could be left at dissolution or partition with less actual value than at the time of marriage. Exactly what portion of assets separately owned by one spouse should be retained at dissolution or partition? The basic principle defines what is owned by the spouse; apportionment is the formula for carrying out the principle.

Perhaps the following discussion of apportionment will clarify some of the problems involved and some of the suggestions which have been offered.

Apportionment:

In community property states, at dissolution or partition there is no right to the return of the value of separate property which has been consumed or dissipated; that is, the asset must exist at dissolution and be traced to a separate property source in order to establish ownership.[78] The car, the furnishings, the phonograph, etc.

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78 Cross, "Community Property Law In Washington," pp. 767-769.

are all consumables and do not create apportionment problems at dissolution. Unallocated profits from separately-owned business on which one or both spouses have labored is the situation which is typically involved in apportionment problems. An obvious example is the husband who owns a business worth, say, $50,000 at marriage. He works for it and draws a salary of $200,000 during the 10-year marriage. At the time of dissolution the business is worth $100,000. How is the unallocated $50,000 rise in the value of this business to be apportioned? How much belongs to the marital partnership and how much to the husband? This rise could be from many factors: inflation, hard work and skillful management by the husband, luck or "chances of trade," or perhaps the husband did not withdraw the true value of his labor, etc. There are at least three major alternatives which should be considered:

1. The British Columbia recommendation classifies capital gain on separate property as belonging to the owning spouse. This has the advantage of a fair amount of certainty; formulas used by taxing authorities could be used. This suggestion is worth consideration.

2. Herma Hill Kay[79] has suggested that the simplest solution is to return to the owning spouse only that which has been brought to the marriage; i.e., a dollar-for-dollar claim in separate assets in existence at dissolution. For example, the husband in the

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79 Professor of Law, University of California-Berkeley, co-reporter of the Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Marriage and Divorce Act, consultant to the Wisconsin Marital Property Partnership Reform group.

hypothetical above would be entitled to $50,000 as his separate interest; the marital partnership would share the $50,000 rise in value. The non-owning spouse would not have a claim to title, or ownership, of this business property but would receive half of the $50,000 rise of value.

3. Richard Bartke suggests that the owning spouse retain the value of the property, determined as of the date of dissolution as if it were in its original condition at the time of marriage. The partnership receives, then, the difference between that figure and the actual present value of the property which includes improvements.[80] This method is consonant with the Texas and Louisiana systems, and treats community contributions to the separate property as an investment, sharing in both losses and gains. In the hypothetical, if the present value of the property, determined on the basis of its condition at marriage is determined to be $70,000, then that would be the husband's separate interest in the business, and the remaining $30,000 would be the marital partnership's interest. This formula would take into consideration fluctuations in the value of the dollar. A special exception should be made for non-income producing property which is not used by the marital partnership. In this event, the marital partnership receives no benefit from the property, yet may have expended considerable funds or labor to the upkeep, taxes, etc.

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80 Bartke, p. 390.

Unless the natural increase of this property corresponds to the value invested by the marital partnership, all their investment could be lost -- hence the need for a special exception.

These three suggestions should be carefully examined and considered before a final recommendation is made. The decisions made on the measure of apportionment will not only determine the basic classification of natural increase on separate property, but will affect decisions on reimbursement rights for community expenditure on separate property.[81]

SPOUSES' INTEREST IN MARITAL PROPERTY

1. "Marital Property" is:

   c. Each spouse has an existing, present undivided one-half ownership in all marital property. This ownership is by virtue of the marital partnership; contribution by dollar amount will not be considered when determining the amount of one spouse's share.

This section is designed to ensure that each partner has an existing, present interest in a full one-half of all marital property, and to preclude any suggestion that one spouse has a mere inchoate expectancy. It is also designed to prevent any extension to the proposed marital partnership principles of present Wisconsin law which define the size of a share of property held in joint tenancy or tenancy in common on the basis of dollar contributions.[82]

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81 Note: if property is to be divided by equitable considerations alone at divorce, major apportionment problems should not arise at that time. Bartke, p. 400.

82 Jezo v. Jezo, 23 Wis.2d 399, 127 N.W.2d 246 (1964); Priebe v. Svehlek, 245 F.Supp. 743 (E.D. Wis. 1965).

BASIC DEFINITION OF SEPARATE PROPERTY

RECOMMENDATION:

2. "Separate Property" is:

   a. property acquired by either spouse before marriage and filed in a formal declaration of assets and debts at marriage. Full disclosure will be required.

The requirement of a declaration of assets and liabilities, to be filed at marriage in a Marital Registry will foster several benefits:

1) it will protect spouses at dissolution or partition by providing an official record of property owned at marriage, thus preventing loss to the separate owner by its being classified as marital property later;
2) it will facilitate the resolution of some tracing problems;
3) it could be used as official notice to third parties that a particular asset is separately owned; and
4) it will help to facilitate a true partnership -- since management as partners, decision-sharing, and informed contracting must be based on full knowledge of the financial situation of both partners.

RECOMMENDATION:

2. "Separate Property" is:

   b. property acquired by either spouse by gift, bequest, devise or descent; a pure donation.

"A pure donation," is added because a gift or inheritance to one person may be in return for the labor of one or both spouses and should, therefore, belong to the marital partnership. For example, a spouse could inherit mother's estate in return for caring for her during her last years; as a return for labor, such an inheritance should be marital property and not separate property.

PRESUMPTION FAVORING THE MARITAL PARTNERSHIP

RECOMMENDATION:

3. Presumption that all property is marital property:

> It is presumed that all property is marital property and the burden of proving that property is separately owned is on the person so asserting. Commingling of marital and separate property so as to make tracing of funds impossible converts separate property into marital property.

In community property states, this presumption determines that property belongs to the community if: a) funds are commingled such that it is impossible to trace the source of the funds; or b) the source of a particular asset is unknown. The presumption should be difficult to rebut with the burden on the person claiming that property is separate -- since some of the inequities and inconsistencies in California decisions were the result of a weak presumption favoring the community and placing the burden of proof on the spouse asserting that property was community property.[83] This is an important and necessary rule.

REIMBURSEMENT

RECOMMENDATION:

4. Reimbursement:

> It is presumed that all expenditures from separate assets for

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83 Helms.

either family use or on the separate property of the other spouse are gifts, unless there is an express agreement to the contrary.

Since a couple may own community property, husband-separate and wife-separate property, there are three possible funds. At any time one fund is the source of the contribution to enhance the asset of any of the other funds a right to reimbursement may arise. The right is "predicated on equitable considerations" in Washington.[84] These considerations are based on the circumstances surrounding the contribution, looking at such things as, whether it is most likely that this particular contribution was intended as a gift or a loan, the purpose of the contribution, whether an asset was purchased in the title of the donee or how it was contributed, whether the donor received a benefit or use from the contribution, whether the managing spouse contributed funds from the community to his or her own separate property or to the other's separate property, etc.

Community expenditures for separate property:

If the community owns the fruits and/or natural increase of separate property, the community will benefit from expenditures on that property so long as the property either produces income or is used by the community; these expenditures are investments. In Texas and Louisiana there is no reimbursement for community expenditures

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84 Cross, "Community Property Law in Washington," p. 776.

for taxes, repairs, upkeep, etc., on separate property, because these are considered proper expenditures to preserve an asset which benefits the community by its profits or use.[85] Even in Washington (where fruits belong to the separate owner), these expenditures are not recoverable if the community benefits by use of the asset.[86]

Unless there is an express agreement otherwise, the clearest right to return of community contributions to separate property is the discharge of encumbrances on that property. Secondly, if the separate property is improved with community funds, in Texas and Louisiana there is also the right to reimbursement -- although the measure of recovery may depend on the value of the improvement rather than the amount of funds used.

The final decision on how to handle reimbursement for partnership expenditures on separate property will depend on how we decide to classify the ownership of the fruits and the natural increase of separate property.

Separate expenditures for living expenses:

Since both spouses are under a duty to support each other and their children, no right to reimbursement should arise for the use of separate funds for living expenses (which are consumed, in any event). However, one spouse may wish to prove that a particular asset or assets were purchased with separate funds and does not have clear and certain

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85 Bartke, p. 391.
86 In Re Woodburns Estate, 190 Wsh. 141, 66 P.2d 1138 (1937).

records to prove it. In this event, "a particularly important rule is that if funds of both kinds are available, the appropriate fund will be presumed to have been used to discharge an obligation to pay an expense, i.e., separate funds to discharge separate obligations and community funds to discharge community obligations. The normal running expenses of the marriage (including family expenses) are to be charged principally to community property income."[87] This is the Family Expense Doctrine that can create serious inequities at dissolution: if one spouse can show that all community income has been consumed by living expenses at a particular point in time, then an accumulation or an asset purchased at that time can be identified as having been purchased with separate funds,[88] a very different process from straight tracing of funds to the purchase of the asset. Although there should be fewer instances where there is no accumulation of community property in a system where the fruits of separate property belong to the community, the Family Expense Doctrine should not be allowed as proof of separate ownership of property.

No right to reimbursement should ever arise for the use of separate funds for living expenses. Proof that an asset is separately owned should rest on clear tracing of the asset and not on the basis of the Family Expense Doctrine. Separate property used for family expenses or family-used assets should be presumed to have been a gift, with a high

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87 Cross, "Community Property Law in Washington," p. 769.
88 See v. See.

standard of proof for rebuttal.

Separate assets used for community business:

This is a different kind of use of funds for the benefit of the community than is the use of living expenses, especially if it is used to pay off encumbrances or to improve community business property. Since the separate donor has: (a) one-half ownership in the business and shares the profits; and (b) sole control of his or her separate assets, this, too, should be presumed a gift.

Separate contributions to the other spouse's separate property:

If one spouse uses separate assets to improve, pay off a loan, pay taxes on, or for maintenance for the other spouse's separate property, the normal rule is the same as above: a rebuttable presumption of a gift. In both instances, proof of an express agreement otherwise will rebut this presumption.

Enforcing the right to reimbursement:

There are two major approaches to enforcing the right to reimbursement:[89]

1. Reimbursement theory: (Texas, Louisiana) The community expenditures on separate property give rise to the right to reimbursement, but acquires no rights in the property itself; funds expended are like an unsecured loan, which is to be repaid at dissolution.

2. Lien theory states: (Washington has the best rules) An equitable lien attaches to the property as an improvement is made or encumbrances are paid off. This lien is prior to and superior to third party rights in the

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89 Bartke.

property, other than bona fide purchasers or encumbrances for value and without notice.[90]

The lien theory appears to protect the community from claims of separate creditors in Washington and Arizona where the community is not liable for separate debts of the spouses, because the community can assert its prior, secured claim against other creditors. On the other hand, this right, created by the lien, will be available to the community creditors because it is a community investment.

In Texas and Louisiana, however, where the community acquires no right in the property, the community is only a general creditor of the separate property owner and thus will only share pro rate with other unsecured creditors in case of bankruptcy.[91]

Our tenative recommendation is that the lien theory should be adopted; however, this should be determined along with other decisions made in the area of creditor-debtor rights.

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90 Flynn v. Allender, 75 Ariz. 322, 256 P.2d 560 (1953).
91 Bartke, p. 418.

CONCLUSION

Recommendations from the Wisconsin group on the form of an equitable marriage partnership property system have been made thus far only in the area of classification of property. In Section II, the very abbreviated analysis of c/p law, further research was recommended again and again as a prerequisite for intelligent consideration of the many diverse policy decisions that must be made. Before an integrated model marital partnership property proposal can be developed for the consideration of the American people, much further work must be done to assess the impact on taxation at the federal and state level, probate, contract law, creditors' and debtors' rights. Many questions must be answered, such as: should the marital partnership system apply to putative or meretricious relationships, or to common law marriages? how can the right to equal management of partnership property be effectively enforced without burdening people with cumbersome procedures? what kind(s) of registries of property ownership or individualized marriage contracts might need to be set up, and how can this be done both economically and in such a way that private affairs do not become a matter of public knowledge? how can the transition from one marital system to another be effected in an orderly and equitable manner?

This paper is offered as a contribution toward the development of an equitable marital partnership property proposal which can be used as a model and guide in reforming obsolete marital property laws. Two Canadian provinces with

s/p systems have already taken the first steps toward achieving this needed reform. In December 1973 the Lieutenant Governor of British Columbia appointed a Family and Children's Law Commission to make an intensive and thorough study of the laws affecting the property rights of married couples in that province. The government of the province of Ontario, Canada announced in October 1976 that it intended to reform its family, property and support laws.

What has been begun in Canada should also be undertaken in American s/p jurisdictions. The preparation and enactment of equitable marital property legislation will be a complex and time-consuming task, but it must and can be done.

A noted commentator on the American scene once described our approach to the family and the prospects for changing that approach in the following words:

> "We do almost no single, sensible, and deliberate thing to make family life a success. And still the family survives. It has survived all manner of stupidity. It will survive the application of intelligence."[92]

And intelligence convinces us that equalizing the stake of both husband and wife in a true marital partnership can only strengthen the family.

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92 Walter Lippman, "Drift and Mastery," in The American Woman -- Who Was She? (1971).

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